UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAURENCE WOLF, d/b/a
LAURENCE WOLF PROPERTIES, individually,
and on behalf of a class of similarly-situated
persons and entities

Plaintiff,

v.

CITY OF DETROIT,
a municipal corporation,

Defendant.

Case No. 2:23-cv-11645
Hon. Brandy R. McMillion
Magistrate Kimberly G. Altman

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FED. R. Civ. P 56 ON THE ISSUE OF OBSTACLE PREEMPTION [ECF NO. 50]

I. INTRODUCTION

The Court has the unenviable task of having to cull through a gross amount of chaff to find the small amount of wheat contained in the City's Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment [ECF No. 55]. This is purposeful. The City has no legal defense to the issue of obstacle preemption—which is an issue of law for the Court to decide. Thus, having no answer to Plaintiff's motion on the legal issue of obstacle preemption, the City inundates the Court with red herring opinion "evidence" contained in self-serving declarations designed to obfuscate the issues by

crafting out of whole cloth purported "questions of fact," but which simply are inadmissible on the legal issue presented in Plaintiff's motion.

The Court should not be fooled by the City's elaborate 59-page dog and pony show—which, as shown below, does nothing to refute or undermine the evidence and law presented in Plaintiff's Motion for Partial Summary Judgment [ECF No. 50].

Accordingly, the Court should grant Plaintiff's Motion.

II. FEDERAL PREEMPTION IS A LEGAL ISSUE FOR THE COURT TO DECIDE UNDER STATUTORY INTERPRETATION PRINCIPLES

A. THE PRINCIPLES THE COURT MUST APPLY TO DETERMINE CONGRESSIONAL INTENT.

The overwhelming authority demonstrates that the issue of federal preemption is a **pure question of law** for the Court to decide. *See e.g. Merck Sharp & Dohme Corp. v Albrecht*, 587 U.S. 299, 315-318, 139 S. Ct. 1668, 203 L. Ed. 2d 822 (2019); *United States v RI Insurers' Insolvency Fund*, 80 F3d 616, 619 (1st Cir. 1996)(a "federal preemption ruling" involves "a pure question of law"); *Blunt v. Medtronic*, Inc., 315 Wis. 2d 612, 760 N.W.2d 396 (2009) ("whether federal preemption applies is a question of federal law that we review independently."); *Texas Mfrs. Housing Ass'n, Inc. v. City of La Porte*, 974 F. Supp. 602, 604, 607 (S.D. Tex. 1996)(matters regarding federal preemption are questions of law for the court).

This is because federal preemption primarily concerns whether, as a matter of statutory interpretation, Congress has enacted a law for which a particular state rule is "to the Contrary" under the Supremacy Clause. US Const, art VI, cl 2. *See CSX Transp*

v Easterwood, 507 US 658, 664; 113 S Ct 1732; 123 L Ed 2d 387, 396 (1993)("evidence of pre-emptive purpose is sought in the text and structure of the statute at issue"); *Virginia Uranium, Inc. v Warren*, 587 U.S. 761, 767, 139 S. Ct. 1894, 204 L. Ed. 2d 377 (2019)(examining preemptive effect by "looking to the text and context of the law in question…guided by the traditional tools of statutory interpretation"); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) ("Pre-emption fundamentally is a question of congressional intent and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one").

Simply, for or all types of preemption, including obstacle preemption, the "foremost" consideration is "congressional intent." *Roberts v United Healthcare Servs, Inc*, 2 Cal App 5th 132, 142; 206 Cal Rptr 3d 158 (2016); *McDaniel v Upsher-Smith Laboratories*, 893 F3d 941, 944 (6th Cir. 2018). Indeed, the "**purpose of Congress is the ultimate touchstone in every preemption case**." *Wyeth v. Levine,* 555 U.S. 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009)(emphasis added); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). Congress may "indicate pre-emptive intent through a statute's express language or through its structure and purpose." *Genbiopro, Inc v Sorsaia,* 2023 U.S. Dist. LEXIS 149195, at *16 (SD W Va 2023)[ECF No. 50-2, PageID.1949]; *Altria Grp., Inc. v. Good,* 555 U.S. 70, 76, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008). *See also* discussion ECF No. 50, PageID.1702- PageID.1705.

Finally, it is axiomatic that issues of statutory interpretation are also questions of law for the court. *See Ohio Adjutant General's Dep't v Fed Labor Rels Auth,* 21 F.4th 401,

407 (6th Cir. 2021)*; Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004) ("Questions of statutory interpretation are questions of law, which we review de novo."); *In re Danny's Markets, Inc.,* 266 F.3d 523, 525 (6th Cir. 2001)("Statutory interpretation...involves pure questions of law").

Thus, the only "facts" the Court may consider to determine the legal issue of obstacle preemption concern the purpose and intent of the statute—and these facts are not meaningfully in dispute despite the City's efforts to confuse the issues and cast them as such. Simply put, it is the Court's role to determine if principles of obstacle preemption prohibit the City's additional conditions, and evaluation of Congressional intent of the Relief Acts is the key. As discussed below, the opinions of City agents stated in City-serving declarations cannot impact or inform the Court's analysis.[1]

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[1] The City references a few unpublished cases as support for obstacle preemption presenting a question of fact—but these cases are the exception, not the rule, and contravene the overwhelming majority of case law (hence perhaps why unpublished).

For example, in *PPL Energyplus*, LLC v Solomon, 2012 U.S. Dist. LEXIS 140335 (DNJ 2012) (Exhibit F, hereto) the District Court of New Jersey determined that there were disputed facts regarding whether an obstacle even existed between a state energy law (the LCAPP Act) and the Federal Power Act which rendered summary judgment inappropriate. *PPL Energyplus* at *29. In *Norfolk Southern R v Box*, 2007 U.S. Dist. LEXIS 23879 (ND Ill 2007) (Exhibit G, hereto) plaintiff challenged a local regulation that required rail carriers to "provide walkways adjacent to yard tracks constructed or reconstructed after February 15, 2005" as being preempted by the Federal Railway Safety Act. *Norfolk Southern*, at *2. The Northern District of Illinois determined that on the evidence presented, genuine issues of material fact existed as to whether the state regulation would stand as an obstacle to the accomplishment of the full purposes of federal requirements for track safety and structure *Norfolk Southern,* at*43-44.

Review of these unpublished cases shows that their factual disputes concerned whether an obstacle to the federal law existed. The disputed facts in both cases involved

B. THE CITY'S DECLARATIONS ARE IRRELEVANT AND INADMISSIBLE ON THE LEGAL ISSUE OF OBSTACLE PREEMPTION TO THE EXTENT THE DECLARANT PURPORTS TO DIVINE THE INTENT OR PURPOSE OF THE RELIEF ACTS.

The City provides three declarations in its defense of Plaintiff's motion for partial summary judgment—each opining as to the purpose and intent of the Relief Acts. *See* ECF No. 55-2, PageID.2148 at ¶ 4; ECF No. 55-3, PageID.2217 at ¶ 10; ECF No. 55-4, PageID.2274-PageID.2275 at ¶ 10. Astonishingly, each of these declarants also "opines" on the exact legal issue presented in Plaintiff's motion—informing the Court that: "the City's "80/20" condition did not constitute an obstacle to the accomplishment of the purposes of the Relief Acts." *See* ECF No. 55-2, PageID.2162 at ¶ 39; ECF No. 55-3, PageID.2225 at ¶ 29; ECF No. 55-4, PageID.2279 at ¶ 27.

These self-serving, conclusory opinions are wholly irrelevant and inadmissible on the legal issue presented. The City's declarants are not attesting to "facts" but inappropriately making a legal conclusion—which is solely the Court's job to do. Indeed, this is true whether the declarant is an expert witness or even a congressman—let alone the lay "fact witnesses" proffered by the City in this case.

Whether "federal law preempts a state claim is a question of law for the court to decide **and not for an expert** to comment on." *See Hovey v Cook Inc*, 2015 U.S. Dist.

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complicated questions regarding utility rates and energy pricing, engineering reports and expert affidavits on safety engineering standards. Thus, not only do these cases offer no precedential value but they are readily distinguishable from the case at bar which does not require the evaluation of such technical facts and standards.

LEXIS 38201, at *58-60 (SD W Va 2015)(emphasis added) (Exhibit H); *Nat'l Home Equity Mortg. Ass'n v. Face*, 64 F. Supp. 2d 584, 591 (E.D. Va. 1999), *aff'd*, 239 F.3d 633 (4th Cir. 2001) *citing United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 365, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990)("**The Supreme Court has expressly stated that federal preemption of contrary state laws presents pure questions of law**…").

As reasoned by the Southern District Court of New York in *Mar-Can Transp Co v Local 854 Pension Fund*:

> The **bulk of both parties' expert reports consist of legal opinions or conclusions regarding how to interpret the statue's plain language and analysis of the relevant caselaw**….**Such analysis is my job, and thus the reports are neither necessary nor helpful in my consideration of the question of statutory interpretation posed by the pending motions**. *See Thomsen v. Kefalas*, No. 15-CV-2668, 2018 U.S. Dist. LEXIS 49798, 2018 WL 1508735, at *18 (S.D.N.Y. Mar. 26, 2018) ("It is well-settled in this Circuit that expert opinions as to the interpretation and application of domestic law are inadmissible."); *United States v. Adnan Ibrahim Harun a Hausa*, No. 12-CR-134, 2017 U.S. Dist. LEXIS 132760, 2017 WL 354197, at *2 n.2 (E.D.N.Y. Jan. 25, 2017) ("[**D]ivining the intent of Congress would not be a proper subject for testimony by an expert, whereas statutory interpretation is a proper task for the Court**."). **Thus, I exclude the reports of both experts because they "provide[] legal opinions, legal conclusions, [and] interpret[] legal terms; those roles fall solely within the province of the court**," *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 48 (S.D.N.Y. 2016). [*Mar-Can Transp Co,* 722 F Supp 3d 355, 363 (SDNY, 2024)(emphasis added).]

In *Shirt v Hazeltine*, again relying upon U.S. Supreme Court precedent, the District Court of South Dakota excluded as both irrelevant and inadmissible the testimony of individual *congressmen* offered as evidence of legislative intent of Section 2 of the Voting Rights Act of 1965 stating:

> **"Congress…clearly expressed its desire** that § 2 *not* have an intent component." *Id.* at 1499. Thus, testimony of current legislators' intent when passing the redistricting plan is irrelevant. Only relevant evidence is admissible, and to be relevant, evidence must have the tendency to make the existence of a fact that is of consequence more or less likely. Fed. R. Evid. 401-402. Because intent is not a fact that is of consequence in this case, evidence of such intent is inadmissible.
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> Even if evidence of intent is relevant, courts should allow testimony by legislators relating to their intent only in extraordinary circumstances. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268, 97 S. Ct. 555, 565, 50 L. Ed. 2d 450 (1977). Proving the actual motivation of a large body of legislators is difficult and can often be misleading. *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916, 1920, 85 L. Ed. 2d 222 (1985).
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> Here, defendants have made no showing of extraordinary circumstances. [*Shirt v Hazeltine*, 2003 U.S. Dist. LEXIS 29762, at *5 (DSD 2003)(bold and italicized emphasis in original) (Exhibit I).]

Based upon the foregoing, the City's declarations (ECF No. 55-2, ECF No. 55-3, ECF No. 55-4) are irrelevant and inadmissible on the legal issue of obstacle preemption as they do nothing more than present inappropriate legal opinions on the purpose of the Relief Acts and self-servingly make a legal conclusion that the City's CERA "80/20" condition was not preempted by the Relief Acts. Thus, these declarations do not attest to facts pertinent to the issue presented and lack the "tendency to make the existence of a fact that is of consequence more or less likely."

A party opposing a motion for summary must submit admissible evidence to support its argument and cannot create a material question of fact using inadmissible evidence. *See Tolliver v Fed Republic of Nig*, 265 F Supp 2d 873 (WD Mich, 2003):

> In accordance with Rule 56(e), the Sixth Circuit has held "that documents submitted in support of a motion for summary judgment must satisfy the

> requirements of Rule 56(e) **otherwise, they must be disregarded**." *Moore v. Holbrook,* 2 F.3d 697, 699 (6th Cir. 1993). Thus, in resolving a Rule 56 motion, the Court should not consider unsworn or uncertified documents, *Id.,* unsworn statements, *Dole v. Elliott Travel & Tours, Inc.,* 942 F.2d 962, 968-969 (6th Cir. 1991), inadmissible expert testimony, *North American Specialty Ins. Co. v. Myers,* 111 F.3d 1273, 1280 (6th Cir. 1997), or hearsay evidence, *Hartsel v. Keys,* 87 F.3d 795, 799 (6th Cir. 1996); *Wiley v. United States,* 20 F.3d 222, 225-226 (6th Cir. 1994). **Thus, "[a] party opposing a motion for summary judgment cannot use hearsay or other inadmissible evidence to create a genuine issue of material fact."** *Sperle v. Mich. Dep't of Corr.,* 297 F.3d 483, 495 (6th Cir. 2002) (quoting *Weberg v. Franks,* 229 F.3d 514, 526 n. 13 (6th Cir. 2000)). [*Tolliver* at p. 879 (emphasis added).]

Indeed, the City acknowledges in its brief (e.g. ECF No. 55, PageID.2140, § III), that these declarations were submitted in order to create an issue of fact—but the City's opinions and legal conclusions cannot create an issue of material fact to avoid summary judgment. *See 770 PPR, Ltd liability Co v TJCV Land Trust*, 30 So 3d 613, 619 (Fla Dist Ct App 2010) (…conclusory assertions are insufficient counter-evidence to avoid summary judgment"). As stated in *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309 (Fla. 1st DCA 1991):

> Counter-affidavits filed for purposes of avoiding summary judgment must be made on personal knowledge and must set forth the facts upon which the affiant relies. **Mere conclusions by the affiant are insufficient, and a party does not create a fact question merely by placing his assertions in affidavit form**. [588 So. 2d at 310, emphasis added.]

Thus, while the City's three declarations strive to manufacture "issues of fact" to overcome Plaintiff's motion, they simply cannot under the governing legal standard. Indeed, if experts and congressmen cannot testify to preemption issues, certainly the City's lay witnesses cannot testify. It is solely for the Court to determine the pure legal

issues presented in Plaintiff's motion. Accordingly, the Court should exclude these declarations as inadmissible and irrelevant.

C. The City's Actions In Implementing and Administering CERA Programs Cannot Dictate Congressional Intent.

The City's declarants also attested to a plethora of facts related to the implementation and administration of CERA programs in the City—specifically trying to justify its "80/20" protocol."[2] But importantly, **how** the City and its HARAs administered CERA programs in the City cannot dictate or elucidate the two core legal questions presented to the Court and which must be answered by the Court:

- What is the intent and purpose of the Federal Relief Acts?

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[2] The City necessarily admits that it imposed its "80/20" protocol on distribution of the CERA Relief Funds regardless of whether it was the Grantee. *See e.g.* ECF No. 55, PageID.2096: "…although the City did not possess or control the CAA funds provided under the MSHDA program, **the HARAs processing applications under both programs applied terms and requirements developed by the City under its program to all applications involving Detroit renters**." [emphasis added] *See also,* Exhibit A, excerpts from Lakeshore Legal Aid PowerPoint outlining "Detroit CERA 80/20 Process" under the MSHDA program; Exhibit B, March 17, 2021 Press Release, announcing the City's CERA Process, "funded by the U.S. Treasury and administered by the Michigan State Housing and Development Authority. The City of Detroit has in turn partnered with local nonprofit agencies for implementation…"

The City's newfound assertion that it had "no control" over distribution of the CAA Funds under the MSHDA program is only further support for federal preemption of the City's "80/20" protocol and additional restrictions imposed because the City was not an eligible grantee of CAA funds and thus, its CERA protocols were wholly *ultra vires* under the Relief Acts. Here, Congress expressly intended that only eligible grantees and their designees be empowered to determine eligibility requirements and distribute funds. *See e.g.* § 9058a (b) and (c)(1)-(5) ("the amount appropriated…shall be allocated and paid to **eligible grantees** described in subparagraph (B). [ECF No. 50-1, PageID.1718-PageID.1721.]

- Did the City's additional restrictions—most specifically its "80/20" condition—stand as an obstacle to the Relief Acts' intent and purpose?

Thus, while the declarations purport to identify facts that may or may not be in dispute, the Court need not resolve any material fact disputes. Stated simply, the City's disputed "facts" are not **material** to the pure legal issues presented in Plaintiff's motion.[3]

For example, the City asserts that its CERA requirements—specifically its "80/20" protocol—did not **unduly delay** the distribution of CERA funds and therefore did not stand as an obstacle to the Relief Acts. *See e.g.* ECF No. 55, PageID.2134. The City supports this statement by generally relying upon its self-serving, conclusory declarations and concludes that "[e]ven where the rental property did not have a certificate of compliance or exception, the HARAs **could quickly make awards** in the amount of 80% of the calculated rent owed and could quickly distribute these funds." *See* ECF No. 55, PageID.2134-PageID.2135 (emphasis added).

But the City's foregoing assertion misses the point. The general delays incurred by the City and its HARAs in implementing and administering CERA programs and generally distributing Relief Funds are not material to Plaintiff's motion—although it

[3] "An issue of fact is 'material' if it is outcome determinative." *Patel v. Allstate Ins. Co.,* 105 F.3d 365, 370 (7th Cir. 1997).

certainly was an issue.[4] The delay that is material is the delay in distributing the 20% escrowed under the City's "80/20" protocol.

Here, it is worth noting that the City **admits** that landlords "did not in all cases receive 100% of all the maximum potential rent they were owed by tenants…". ECF No. 55, PageID.2134. Thus, the delay that is most acutely applicable to the issue of obstacle preemption is the delay that the City necessarily admits—the delay in paying the 20% of the escrowed funds to the Approved Landlords, which still has not been done in most instances. This delay clearly demonstrates that the City's "80/20" protocol stood as an obstacle to the purpose of the Relief Acts—depriving Approved Landlords and their tenants of "fast and direct" payment in full of emergency relief funds that they had been awarded and were owed. Indeed, even at this late date, and despite Plaintiff's multiple discovery requests on the issue, the City and its HARAs still cannot identify where the 20% escrowed funds are or state whether these funds were distributed in whole or in part, and if so, to whom.

Another example of a fact the City places in dispute—but which is wholly irrelevant to the Court's decision on Plaintiff's motion—is the City's assertion that

[4] It is disingenuous for the City to argue that its protocols did not delay distribution of Relief Act funds. *See e.g.* Exhibit C. MSHDA Quarterly Report (Q1, 2022): "Detroit continues to be our slowest area for service. We are working with the City leadership and our sub-recipients to speed up their processes." Exhibit D, April 27, 2022 Bridge Detroit Article documenting the City's slower paced distribution of Relief Funds. Here, the City cannot reasonably deny that its residents experienced significant delays in receiving Relief Funds.

neither MSHDA, HAND or the U.S. Treasury objected to the City's "80/20" protocol or to the manner in which CERA funds were being distributed. ECF No. 55, PageID.2136- PageID.2137.

In support of this assertion, the City expressly states that it informed the U.S. Treasury of its "80/20" protocol through required quarterly reporting. However, the report referenced by the City does not contain **any express disclosure** of the City's "80/20" protocol or its additional criteria imposed upon Approved Landlords that prevented them from obtaining 100% of the Relief Funds awarded to them. *See* ECF No. 55-2, PageID.2161 at ¶ 36; ECF No. 55-20, PageID.2520-PageID.2521. At best, the City's reference to a website is obscure and indirect—even if the website outlined the City's CERA Program, which there is no evidence that it did. At worst, it is simply dishonest for the City to attest that the Treasury **knew** about the City's "80/20" protocol based upon a quarterly report that only identified a website.[5]

As a final example of a fact the City places in dispute (but which is wholly not material to the Court's determining Plaintiff's motion) the City asserts that a HARA would use the MSHDA worksheet to calculate a potential maximum rental assistance number—that would be "approved," but not "awarded." Instead, the HARAs next applied the City's CERA program requirements, including the "80/20" provisions, to

[5] Indeed, the City's declarants have no personal knowledge of what the Treasury "knew" and simply cannot testify as to the Treasury's actions as to the City's "80/20" protocol. The City's "evidence" is pure speculation.

determine the amount of the award. ECF No. 55, PageID.2126.

While the City's spin on whether the Relief Funds were "awarded" is not material to the obstacle preemption issue, it is worth noting that the City's newfound argument is fully contradicted by the City's own documents—including the very settlement statements its declarants attach and reference—and MSHDA data which shows that the City reported to MSHDA that it had actually **awarded** the full amounts calculated under the MSHDA worksheet. *See* Exhibit E.

Here, to the extent that the facts surrounding the City's conduct could be relevant to the obstacle preemption issue, the **only** relevant facts are these:

1. The Relief Acts set forth the requirements that a landlord and tenant had to satisfy in order to be approved for rental assistance.
2. The Relief Acts do not explicitly authorize additional state or local requirements that could be imposed as a condition of a landlord or tenant's receipt of rental assistance funds.
3. The City required the HARAs to impose the additional 80/20 requirement and the HARAs actually did so.
4. As a result of the City's dictates, Approved Landlords did not receive the full amount of rental assistance awarded.
5. By withholding the 20% the funds that otherwise would go to Approved Landlords, the tenant retained the obligation to pay that portion of the unpaid rent that otherwise would be discharged if the HARAs had released 100% of the funds instead of only 80%.

In sum, the City simply presents too many purported "questions of fact" to be fully discussed here.[6] Again, however, like the examples described above, none of these

[6] The City also argues that other CERA programs such as those implemented in King County, Washington, Maryland and California somehow justify the City's 80/20 Protocol under obstacle preemption standards. *See e.g.* ECF No. 55, PageID.2123. But

"factual disputes" are material to the Court determining the purpose of the Relief Acts and ruling on the legal issue of obstacle preemption.

III. IN THE RELIEF ACTS, CONGRESS INTENDED TO PREEMPT THE CITY'S ADDITIONAL CONDITIONS.

A. The City's Conditions Are An Obstacle To The Overriding Purpose Of The Relief Acts – To Provide Fast, Direct Economic Emergency Relief To Tenants and Landlords

Congress expressly stated that the legislative purpose of the Relief Acts was to provide "**fast, direct economic assistance** for American workers, families, small businesses, and industries." *See* ECF No. 50-2, PageID.1906 (emphasis added); PageID.1908. *See also* discussion, ECF No. 50, PageID.1705-PageID.1710; 116 P.L. 260, 2020 Enacted H.R. 133, 116 Enacted H.R. 133; ECF No. 50-1, PageID.1765.

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this argument is unavailing for several independently-dispositive reasons. First, it is irrelevant whether other state or local CERA programs also imposed illegal conditions and restrictions. The "everybody speeds" defense typically is a nonstarter with any traffic cop. Second, the City cites no court decision under the Relief Acts approving the additional state and local restrictions identified by the City. Third, these other programs are readily distinguishable as they required landlords to "waive a portion of rent owed as a condition of participation"—thus failing to award a portion of the rental assistance in the first instance. Here, in stark contrast, the City's 80/20 Protocol awarded the entire amount to the Approved Landlord (which created a property interest in the full award) but then bifurcated the payment of the awarded rental assistance into two payments: the first payment to the Approved Landlord immediately, and the second payment placed in escrow to be distributed to either the landlord or the tenant, depending upon whether the City's conditions had been met. Indeed, if the City had not awarded the entire amount to an Approved Landlord, there would be no funds to escrow—thus, the City's CERA Program operated much differently than the programs the City holds out as similar. Finally, while arguably unlawful—these other programs are not at issue here and their operation and implementation can have no bearing on the pure legal issues presented here—the issue of Congressional Intent and statutory interpretation.

Contrary to the City's arguments, nowhere is the stated purpose of the Relief Acts limited to *only* preventing evictions or *only* aiding tenants.[7]

Other courts opining on the issue have held that the stated purpose of the relief acts was to provide **fast and direct emergency relief**. *See e.g. Essential Enterprise Solutions, LLC v United States SBA*:

> The purpose of the CARES Act was to provide "fast and direct economic assistance for American workers, families, small businesses, and industries." https://home.treasury.gov/policy issues/coronavirus/about-the-cares-act (last visited December 30, 2024). The SBA furthered that purpose by quickly approving the Loan, which provided assistance to American workers, specifically plaintiff's employees and independent contractors. [*Essential Enterprise Solutions* 2024 U.S. Dist. LEXIS 233671, at *19 (MD Pa 2024) (Exhibit J).]

See also Popal v. State Empl. Sec. Div.:

> **To effectuate the legislative purpose of the CARES Act, President**

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[7] Plaintiff references a number of Federal documents to aid the Court in determining the legal issues presented. *See* ECF No. 50-1, PageID.1718- PageID.1729 (Statutory Language); ECF No. 50-1, PageID.1765; ECF No. 50-2, PageID.1897-PageID.1898; ECF No. 50-2, PageID.1906; ECF No. 50-2, PageID.1908; 16 P.L. 260, 2020 116 Enacted H.R. 133.

Even Michigan guidelines (MSHDA) enforce the federal "fast and direct economic assistance" purpose of the Relief Acts by requiring that local programs who chose to "administer the CERA program with additional rules to coincide with existing local codes/ordinances" may do so as "long as these additional rules **do not conflict with US Treasury regulations or slow the pace of serving eligible tenants and landlords** *See* ECF No. 50-2, PageID.1812. *See also* ECF No. 50-2, PageID.1877.

Nowhere in its response brief does the City meaningfully address the plethora of objective, documentary evidence presented by Plaintiff in support of his motion for partial summary judgment. At best, the City merely states in response to some of these sources that they "speak for themselves." *See generally* ECF No. 55 PageID.2101 to PageID.2107 ("all the pleadings and documents referred to in this paragraph speak for themselves").

> **Biden directed administrative agencies by executive order…to "specifically consider actions that…improve access to, reduce unnecessary barriers to, and improve coordination among programs funded…by the Federal Government…[and] should prioritize actions that provide the greatest relief to individuals families, and small businesses**." Exec. Order No. 14002, Fed. Reg. 7229 (Jan. 22, 2021), *reprinted in* 15 U.S.C.A. § 9001, 86. [*Popal*, 2022 Nev. App. Unpub. LEXIS 468 *4; 518 P.3d 879 (2022)(emphasis added) (Exhibit K); Ex. Or. No. 14002 of Jan. 22, 2021, 86 Fed. Reg. 7229 (Exhibit L).]

Here, the it cannot be reasonably disputed that the purpose of the Relief Acts was to provide "fast and direct" emergency economic relief to **both** landlords and tenants. Indeed, the express language of the statute demonstrates that landlords are directly benefited by requiring that "w**ith respect to financial assistance for rent and rental arrears…**provided to an eligible household from a payment made under this section, **an eligible grantee shall make payments to a lessor…on behalf of the eligible household**. 15 USCS 9058a (c)(2)(C)(i)(I).

Thus as to the two legal questions presented in Plaintiff's motion, the facts are not materially in dispute:

1. **What is the intent and purpose of the Federal Relief Acts?**

To provide "fast and direct economic assistance for American workers, families, small businesses, and industries."

2. **Did the City's protocols—most specifically its "80/20" protocol—stand as an obstacle to the Relief Acts' intent and purpose?**

Yes. The City admits that it imposed protocols and conditions that delayed payment of emergency economic assistance–specifically the "80/20" protocol—which

imposed an improper obstacle to the full purpose and objective of the Federal Relief Acts. Here, the City did not "improve access to, reduce unnecessary barriers to, and improve coordination among programs funded…by the Federal Government." *Popal*, *supra*. The City did not "prioritize actions that provide[d] the greatest relief to individuals families, and small businesses" (*id.)*—with specific harm to the Approved Landlords who still have not been paid the 20% held in escrow. Instead, it prioritized actions to bolster compliance with a local ordinance that it has not been able to meaningfully enforce since 2018. The City prioritized actions that prevented Approved Landlords from receiving payment in full of federal emergency relief funds—because what is clear is that absent the City's "80/20" protocol, the Approved Landlord would have received payment in full of the rent and rent arrears that was calculated and awarded under the Relief Acts.[8]

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[8] *Compare* ECF No. 55-2, PageID.2167, MSHDA Worksheet showing Total Rental Assistance award of $8,662 of which, $6127 was for "eligible past due rental assistance" *to* ECF No. 55-2, PageID.2169, the Settlement Statement which states that "the CERA program **shall pay Landlord $6127.00**…Term Section No. 3(a):

> a. The CERA program shall pay Landlord $ 6127.00 no later than 8/29/2021 (the "Program Portion"). Agency fulfilling Program Portion payment: Wayne Metropolitan Community Action Agency 7310 Woodward Ave. Detroit, MI 48202.

and ECF No. 55-2, PageID.2170, Term Section No. 4(b) which then applies the City's "80/20" protocol to bifurcate the payment between the landlord and an escrow account:

> Payment will be made in the following manner, $4901.60 (80%) shall be paid to the landlord, and $1225.40 (20% shall be held in escrow). Payments shall be made within __21__ days of signing this agreement.

Thus, absent the City's "80/20" condition, the landlord would have received full payment of past due rental assistance in the amount of $6127.00, and the tenant's rent

In sum, if the purpose of the Relief Acts was to provide fast, direct, emergency economic assistance—which is what the legislative documents, case law, and other federal guidance states (see discussion above), then how can the City even begin to justify imposing ***any*** restrictions that might delay distribution of the approved and awarded Relief Funds. How can the City impose a 20% escrow—expressly withholding and/or delaying payment of the 20% of the awarded Relief Funds—to enforce its own local ordinances and a flailing certificate of compliance program?

The answer is: it cannot. The City's CERA protocols—specifically the "80/20" condition is preempted by the Federal Relief Acts.[9]

B. Landlords Clearly Were Intended Beneficiaries Of The Relief Acts

The City's overt hostility to the Relief Acts benefitting Landlords is bizarre. As owners of the rental property, Landlords are a necessary part of the rental ecosystem—and they depend upon the rental income earned from their properties. As Mayor Duggan noted in a March 2021 press release: "Landlords have been significantly

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obligation would be reduced by that amount. *See also* Exhibit E—the City was reporting to MSHDA the Total Rental Assistance award of $8,662—not less the 20% escrow.

[9] The City asserts that there is a strong presumption "against" preemption "especially where the challenged state or local law or regulation advances traditional police powers, such as health and safety requirements or landlord-tenant relationships" *See* ECF No. 55, PageID.2093; ECF No. 55, PageID.2131-PageID.2132. The City's argument is misleading. This case is not about regulating housing conditions or traditional land-lord tenant issues. The crux of this case concerns "fast and direct" distribution of federal emergency Relief Funds—which the City should not be trying to regulate in any way.

impacted by missing rent revenue… .” *See* Exhibit B. Indeed, in Detroit, the rental landscape is primarily comprised of “mom & pop” landlords who rely upon rental income to support themselves (not “mega landlords” as in other cities). *See* ECF No. 50-1, PageID.1792, Detroit Future City Report identifying that the largest group of landlords (70%) are smaller, non-corporatized landlords. Thus in Detroit, the Relief Acts’ emergency economic assistance was necessary to provide relief to both landlords and tenants as part of the same economic system.

The City presents no credible evidence for its repeated assertions that Landlords were not beneficiaries of the Relief Acts or that any benefit to Landlords was “was only an incidental or collateral benefit.” *See e.g.* ECF No. 55, PageID.2111-PageID.2112. Ignoring its own prior documents and admissions (ECF No. 50-1, PageID.1772), the City solely relies upon its self-serving and inadmissible affidavits on this issue—*i.e.* opinions not based upon any documentary evidence and which cannot override objective federal statements and documents on this issue.

Again, the City ignores the plethora of documentary evidence Plaintiff presented demonstrating that **landlords were direct beneficiaries of the Relief Acts**—including the express language of the Relief Acts which requires direct payments to landlords (ECF No. 50-1, PageID.1721); Treasury and Federal guidance (ECF No. 50-1, PageID.1765- PageID.1766; ECF No. 50-2, PageID.1868- PageID.1869); a State Executive Order acknowledging that **“facilitating prompt payment to landlords**” was a necessary part of rental assistance relief (ECF No. 50-1, PageID.1732); and the

City's own admissions (ECF No. 50-1, PageID.1772). It simply cannot be reasonably disputed that Landlords were intended beneficiaries of the Relief Acts.

Finally, not even the City disputes that the Relief Acts were intended to benefit tenants. But the City fails to appreciate that its 80/20 requirement harmed both landlords and tenants. Payments of rental assistance to landlords benefitted tenants by discharging all or part of the tenant's rent obligation to the landlord. By withholding the 20%, the tenant's obligation to pay rent in that amount remained. The City's additional requirement therefore not only harmed Approved Landlords, but it also impaired the prompt delivery of the emergency relief to the tenants.

C. To The Extent That Preventing Evictions Was a Purpose Of The Relief Acts, The City's Conditions Were An Obstacle To The Achievement Of That Purpose.

Even if eviction prevention was the sole purpose of the Relief Acts as the City argues (without any evidence except for its self-serving declarants' opinions), its "80/20" protocol was an obstacle to this purpose.

Landlords are the owners of the property and if not paid rent have every right to evict tenants under state law—which the government recognized when it changed the emergency moratorium on evictions to emergency rental assistance. *See e.g.* ECF No. 55-9, PageID.2318 (noting that Landlords are prohibited from evicting tenants while receiving CERA Funds; ECF No. 50-1, PageID.1732. Thus, as written, the Relief Acts necessarily and expressly protect the landlord's property rights in their property.

Accordingly, even if the purpose of the Relief Acts was to prevent eviction—

there is still an express benefit to landlords who accept relief funds to forego eviction. Put another way, Landlord payments under the CARES Act were **not gratuitous** because the CARES Act took certain rights away from landlords (e.g., imposing an eviction moratorium). *See* 15 U.S.C. § 9058 (Exhibit M); ECF No. 55-9, PageID.2318.[10] The effect of this trade-off was that Landlords could receive direct payment of rent through the Relief Acts. This clearly was a benefit the landlords received in exchange for not being able to evict tenants. Put another way, Congress concluded that the eviction moratorium under the Relief Acts was justified **because** landlords would receive 100% of the rental assistance the tenant was entitled to receive.

As such, the City's actions—which deprived Approved Landlords of full payment of the rental assistance awarded and owed—conflicted with congressional intent to impose an eviction moratorium in exchange for rental reimbursement for landlords by only giving the landlord 80% of the rental assistance the landlord was otherwise entitled to receive. Thus, when the City argues that the purpose of the Relief Acts was to reduce evictions, that is only half of the story. Evictions were being reduced **because** landlords were supposed to receive 100% of the rental assistance the tenant was entitled to receive.

[10] 15 § 9058 (b) issued a temporary moratorium on evictions during "the 120-day period beginning on…March 27, 2020." 15 § 9058a (c)(2)(C)(i)(II) modified that moratorium by providing that "nothing in this section shall be construed to invalidate any otherwise legitimate grounds for eviction."

IV. CONCLUSION AND PRAYER FOR RELIEF

Despite the City's efforts, there are no questions of material fact in dispute. The issue of obstacle preemption is a matter of law for this Court to determine. Based upon the foregoing, it should be clear that the City's CERA protocols—specifically its "80/20" condition—were preempted by the intent and purpose of the federal Relief Acts. Plaintiff requests that the Court find that the City's CERA protocols—and specifically its additional 80/20 condition—are preempted by the plain language and expressly stated objectives of the Relief Acts and therefore unlawful.

/s/ Jamie Warrow

Jamie Warrow
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
jwarrow@kickhamhanley.com
P61521
Counsel for Plaintiff and the Putative Class

Date: February 10, 2025

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2025, I served the foregoing Reply Brief in Support of Plaintiff's Renewed Motion for Partial Summary Judgment pursuant to F.R.Civ.P 56 on the Issue of Obstacle Preemption on all counsel of record using the Court's electronic filing system.

/s/ Jamie Warrow
Jamie Warrow

4920-4031-5673, v. 1

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAURENCE WOLF, d/b/a
LAURENCE WOLF PROPERTIES, individually,
and on behalf of a class of similarly-situated
persons and entities

Plaintiff,

v.

CITY OF DETROIT,
a municipal corporation,

Defendant.

Case No. 2:23-cv-11645
Hon. Brandy R. McMillion
Magistrate Kimberly G. Altman

INDEX OF EXHIBITS TO REPLY BRIEF IN SUPPORT OF PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FED. R. Civ. P 56 ON THE ISSUE OF OBSTACLE PREEMPTION [ECF NO. 50]

A: Excerpts from Lakeshore Legal Aid PowerPoint Outlining "Detroit CERA 80/20 Process" under the MSHDA program

B: March 17, 2021 Press Release, Announcing the City's CERA Process Under ERA 1

C: MSHDA Quarterly Report

D: April 27, 2022 Bridge Detroit Article

E: MSHDA Excel Sheet Data

F. *PPL Energyplus*, LLC v Solomon, 2012 U.S. Dist. LEXIS 140335 (DNJ 2012)

G: *Norfolk Southern R v Box*, 2007 U.S. Dist. LEXIS 23879 (ND Ill 2007)

H: *Hovey v Cook Inc*, 2015 U.S. Dist. LEXIS 38201, at *58-60 (SD W Va 2015)

I: *Shirt v Hazeltine*, 2003 U.S. Dist. LEXIS 29762, at *5 (DSD 2003)

J: *Essential Enterprise Solutions* 2024 U.S. Dist. LEXIS 233671, at *18-19 (MD Pa 2024)

K: *Popal v. State Empl. Sec. Div.* 2022 Nev. App. Unpub. LEXIS 468 *4; 518 P.3d 879 (2022)

L: Ex. Or. No. 14002 of Jan. 22, 2021, 86 Fed. Reg. 7229

M: 15 U.S.C. § 9058

EXHIBIT A

PETER GRANATA

PRO BONO STAFF ATTORNEY

LAKESHORE LEGAL AID

248-443-8068 – EXT 4207

PGRANATA@LAKESHORELEGALAID.ORG

HOUSING AND 36TH DISTRICT COURT ACTIVITIES

LAKESHORE LEGAL AID

COVID EMERGENCY RENTAL ASSISTANCE (CERA)

- **Funding from Michigan State Housing Development Authority (MSHDA) to Fiduciaries--Local Planning Bodies, County Continuums of Care, and/or Housing Assessment and Resource Agencies (HARAs)**
- **The Fiduciaries contract with at least two local *HARAs* to provide rental and utility assistance.**
- **Program governed by US Treasury Department and MHSDA policy**

LAKESHORE LEGAL AID

CERA PROGRAM PARAMETERS

LAKESHORE LEGAL AID

- **UP TO 12 MONTHS OF BACK RENT AND 3 MONTHS FORWARD**
- **IF LL WON'T PARTICIPATE FUNDS CAN BE PAID DIRECTLY TO TENANT**
- **NO CAP ON RENTAL ASSISTANCE AMOUNT**
- **UTILITY ASSISTANCE CAPS BASED ON FAMILY SIZE**
- **UP TO $400 IN LATE FEES**
- **$150 COURT COSTS**
- **NO LL FORGIVENESS %**
- **TENANTS CAN SUBMIT A REQUEST TO MSHDA FOR RELOCATION ASSISTANCE. INCLUDES SECURITY DEPOSIT AND 3 FUTURE MONTHS OF RENT**

DETROIT-ONLY CERA PARAMETERS

ALL RENTAL PROPERTIES IN THE CITY OF DETROIT MUST BE REGISTERED. SEC. 8-15-81.

IN ORDER TO COLLECT RENT, THERE MUST BE A CERTIFICATE OF COMPLIANCE THAT THE UNIT MEETS LOCAL CODE REQUIREMENTS. SEC. 8-15-82. (LEASES EXECUTED FOR PROPERTIES NOT IN COMPLIANCE ARE ILLEGAL CONTRACTS THAT THE COURTS SHOULD NOT ENFORCE.)

SUBSIDIZED HOUSING THAT IS APPROVED BY HOUSING QUALITY STANDARDS INSPECTIONS ARE SUFFICIENT FOR CERTIFICATE OF COMPLIANCE.

LLA | LAKESHORE LEGAL AID

DETROIT CERA 80/20 PROCESS

LAKESHORE LEGAL AID

- **WITHOUT A CERTIFICATE OF COMPLIANCE, THE HARA WILL RELEASE 80% OF THE FUNDS TO THE LANDLORD, AS LONG AS THERE ARE NO MAJOR HABITABILITY ISSUES. THE OTHER 20% WILL BE RELEASED ONCE THE LANDLORD OBTAINS THE CERTIFICATE OF COMPLIANCE.**
- **WHEN THE LL IS MAKING GOOD FAITH EFFORTS TOWARDS MAKING NECESSARY REPAIRS, EXTENSION OF TIME CAN BE GRANTED WHEN APPROPRIATE.**
- **FAILURE OF LANDLORD TO OBTAIN A CERTIFICATE OF COMPLIANCE WILL RESULT IN THE TENANT RECEIVING THE 20% ESCROWED FUNDS.**

WAYNE METRO PAYMENT PROCESS

LAKESHORE LEGAL AID

- **SEND CD SIGNED BY THE PARTIES TO CDCOLLECTION@WAYNEMETRO.ORG**
- **CD WILL TRIGGER A CHECK REQUEST TO WAYNE METRO'S ACCOUNTING TEAM**
- **PAYMENT WILL BE MADE BASED ON THE TERMS IN THE CONDITIONAL DISMISSAL**
- **IF 50% OR 20% IS WITHHELD BECAUSE THERE IS NOT A CERTIFICATE OF COMPLIANCE, SUBMISSION OF THE COC TO WAYNE METRO BY THE LANDLORD OR THEIR ATTORNEY WILL TRIGGER PAYMENT OF THE REMAINING FUNDS. SEND COC TO DETROITRENTALCOMPLIANCE@WAYNEMETRO.ORG.**
- **FORM TO COMPLETE FOR RELEASE OF FUNDS HTTPS://WAYNEMETRO.TFAFORMS.NET/4849168**
- **WM FAQS ON COC HTTPS://DOCS.GOOGLE.COM/DOCUMENT/D/1AXVJ6ZJ3WZQSCOXKZLDLGZ2MDJ0GRR5TFLJBR5ZRELK/EDIT**

CONDITIONAL DISMISSALS

LAKESHORE LEGAL AID

- **CASE IS DISMISSED IF TENANT COMPLIES WITH THE TERMS OF THE AGREEMENT.**
  - **Payment date(s)**
  - **Move out date**
- **DOES NOT APPEAR ON EVICTION/CREDIT REPORT**
- **PRESERVES ELIGIBILITY FOR SUBSIDIZED HOUSING**
- **IF TENANT DOES NOT COMPLY, LANDLORD CAN FILE AN AFFIDAVIT WITH THE COURT AND REQUEST A WRIT.**
- **AGREEMENT MAY REQUIRE FILING AN OBJECTION, NOTICE TO THE TENANT, AND A HEARING.**

SCAO CONDITIONAL DISMISSAL

LAKESHORE LEGAL AID

- **<u>36TH DISTRICT COURT APPEARANCE</u>**
- **USE THE SCAO FORM AND AN ADDENDUM OUTLINING FURTHER TERMS.**
- **OBTAIN ASSENT FROM CLIENT AND LANDLORD OR THEIR COUNSEL GATHER SIGNATURES**
- **FILE WITH THE 36TH DISTRICT COURT, EMAIL TO CLERK**
- **APPEAR FOR SCHEDULED HEARINGS UNTIL THE CD IS SIGNED BY THE JUDGE.**
- **SEND CD SIGNED BY THE PARTIES TO CDCOLLECTION@WAYNEMETRO.ORG**

SCAO CONDITIONAL DISMISSAL

STATE OF MICHIGAN 36th JUDICIAL DISTRICT	CONSENT ORDER FOR CONDITIONAL DISMISSAL Landlord-Tenant	CASE NO. and JUDGE Hon. Alicia Jones-Coleman

Court address: 421 Madison Avenue, Detroit, MI 48226 — Court telephone no.

Plaintiff's name, address, and telephone no.	v	Defendant's name, address, and telephone no.
Plaintiff's attorney, bar no., address, and telephone no.		Defendant's attorney, bar no., address, and telephone no. LAKESHORE LEGAL AID, INC. BY: Peter Granata (P78413) 2727 Second Ave, Ste 301 Detroit, MI 48201 248-443-8068 Ext 4207

THE COURT FINDS the parties agree to the conditional dismissal of the case under the terms below.

THE COURT ORDERS

1. The case is dismissed without prejudice subject to the conditions below.

2. Defendant shall pay the following to plaintiff ☑ pursuant to the terms in item 3: ☑ on or before 03/08/22 (Date):

   a. Rent ..... $ 22,896.00 due through the time period ending 02/28/22 (Date)
   b. Court costs ..... $ 150.00
   c. Other money due ..... $ 400.00 (late fees)
   d. Total ..... $ 23,446.00

☑ 3. Further conditions: Please see Attachment 1 to Consent Order

4. If defendant fails to pay the rent and other costs or meet other conditions as set forth above the plaintiff may seek entry of an order for reinstatement of the case and entry of judgment.

   ☑ a. Plaintiff shall file an affidavit with the court and serve the defendant with the affidavit and notice as required by MCR 2.602(C). If defendant does not file verified objections to the affidavit within 14 days of service of the notice pursuant to MCR 2.602(C)(2)(d), the order for reinstatement of case and entry of judgment, a judgment for money (if eligible and requested in the complaint), and an order of eviction shall enter simultaneously without notice

.50 x 11.00 in

LAKESHORE LEGAL AID

CONDITIONAL DISMISSAL ADDENDUM

STATE OF MICHIGAN
IN THE THIRTY-SIXTH DISTRICT COURT
FOR THE COUNTY OF WAYNE

Plaintiff	Case No. LT XXXXXXXX
v.	**ATTACHMENT 1 TO CONSENT ORDER FOR CONDITIONAL DISMISSAL**
Defendant.	Hon. Judge XXXXX

XXXXXXXXXXXX *Attorneys for Plaintiff*	Indra Priyadarshini Samaiah Pandiyaraj (P84364) Lakeshore Legal Aid *Attorneys for Defendant* 2727 Second Avenue, Suite 301 Detroit, MI 48201 248-443-8068

ATTACHMENT 1

The Plaintiff, _____ and the Defendant, _____, by and through their respective attorneys, agree to the following terms and conditions in addition to those set forth in the attached Conditional Dismissal:

LAKESHORE LEGAL AID

CONDITIONAL DISMISSAL ADDENDUM

1. $_____shall be paid to Plaintiff by the City of Detroit's HARA, Wayne Metropolitan Community Action Agency (Wayne Metro), through the state CERA (COVID Emergency Rental Assistance) funds. The funds are broken down as follows: $_____ for past due rent assistance; $_____ for future rent; $_____ for late fees and $_____ for court fees.

2. Plaintiff acknowledges by signature below that Defendant cannot control the processing or timing of the issuance of CERA funds and agrees to hold Defendant harmless for any delay in the processing of the application or issuance of the funds.

3. Future rent assistance will be applied as follows: $_____ to _____rent, $_____ to _____ rent and $_____ to _____ rent.

4. Out of the total amount of CERA funds, Wayne Metro shall pay Plaintiff $ _____ (calculate 80% of past rental arrears amount) by _____, and $_____ (20% of past rental arrears amount) shall be put in escrow with Wayne Metro, unless plaintiff has already obtained a Certificate of Compliance (CoC) from the City of Detroit, Building Safety Engineering and Environmental Department (BSEED) by the date of this Consent Order For Conditional Dismissal.

5. If Plaintiff obtains a CoC for the subject property within 90 days this Order is entered, the escrowed funds shall be released to Plaintiff. Plaintiff, at its discretion, may extend such deadline by up to three months, provided that it in good faith is seeking to obtain the CofC and provides notice of such extension to Defendant.

6. If Plaintiff fails to obtain the CofC as provided for in Paragraph 5, the funds held in Wayne Metro escrow shall be released to Defendant.

LLA | LAKESHORE LEGAL AID

CONDITIONAL DISMISSAL ADDENDUM

7. Funds shall be released based on a motion by either party with service on the other, or upon the written stipulation of the parties.

8. Plaintiff shall provide at least 48 hours written notice for access to the premises to inspect or complete work necessary to obtain the CoC. Written notice may be by text or e-mail.

9. Defendant shall not interfere with Plaintiff's obligation to obtain a CoC.

10. Plaintiff agrees to make repairs during reasonable hours and to hire repair persons appropriate and licensed as necessary for any work requiring licensing.

11. Payments made in compliance with Paragraph 1 shall constitute full satisfaction of all rent and costs owed to Plaintiff through December 31, 2021.

12. Future repair issues or claims to offset future rent by Defendant are also not subject to litigation in this case.

13. Plaintiff may not file a termination of tenancy case against Defendant without cause, during the time provided to obtain the CoC.

LLA | LAKESHORE LEGAL AID

EXHIBIT B

City of Detroit announces process for tenants to access $50M in eviction defense and rental & utility assistance

MAR 17 2021 MAYOR'S OFFICE

City of Detroit announces process for tenants to access $50M in eviction defense and rental & utility assistance

- Detroit renters financially affected by COVID-19 can go to www.detroitevictionhelp.com or call 866-313-2520 to get help with back rent and utilities.
- Up to 12 months in rent assistance available, amount depends on household income
- Notice of eviction no longer a requirement to qualify for assistance
- Landlords must have buildings free of major health or safety issues to receive full funds.

DETROIT – The City of Detroit and its community partners detailed today how tenants of rental properties affected financially by the COVID-19 crisis and behind in their rent can now apply to receive up to 12 months of rental assistance. The assistance is possible thanks to a new $50 million fund approved for Detroit last week in Lansing. The COVID-19 Emergency Rental Assistance (CERA) program is designed to keep these Detroit residents in their homes by providing funding to get current on their payments, as well as legal assistance if they are facing eviction.

Eligibility

In order to qualify, the household must earn no more than 80% of the area median income (AMI). A Detroit household of one person earning less than $44,000, or a household of four people earning less than $62,800, would qualify. Applicants also must be able to demonstrate financial hardship due to COVID, such as having received unemployment, had their income reduced, or incurred added expenses.

Unlike previous assistance funding, a tenant does not have to have been served with an eviction notice to qualify. The following income-qualifying individuals are eligible:

- Renters with a court order summons, complaint, or judgment against them.
- Renters who are behind on rent and/or utilities and have a past due notice.
- Landlords with tenants who are behind in rent.

How to apply

The funding is now available by applying through www.detroitevictionhelp.com or calling the Detroit Eviction Helpline at 866-313-2520, 8 a.m. until 6 p.m. Monday-Friday and 9 a.m. until noon Saturday. The City's nonprofit partners already have begun working through a waiting list of people who applied but did not receive rental aid in the first round. Renters or landlords can apply to the program, but each must provide supporting documentation.

The amount of rental assistance is determined by the tenants' income:

- Up to 50% AMI (see AMI chart on page 3): up to 12 months of rental assistance
- 50%-80% AMI: up to 10 months of rental assistance
- Tenants may apply for an additional three months of rental assistance, if necessary, for housing stability.

"With the federal moratorium on evictions lifting at the end of this month, we need to keep every Detroiter in their home, and now, more help is available," said Mayor Mike Duggan. "I would like to thank the governor and our nonprofit partners for stepping up to help protect Detroiters facing unprecedented challenges

ensure that they emerge from this pandemic with the security of knowing they are not at risk of being pushed out of their homes."

The program is funded by the U.S. Department of the Treasury and administered by the Michigan State Housing and Development Authority. The City of Detroit has in turn partnered with local nonprofit agencies for implementation: the Homeless Action Network of Detroit (HAND); United Community Housing Coalition; Wayne Metropolitan Community Action Agency (Wayne Metro); MI Legal Services, Lakeshore Legal Aid, and The Heat and Warmth Fund (THAW).

So far, the Michigan Legislature has sent $50 million out of $96 million appropriated for Detroit as part of a COVID-19 relief bill that Congress passed in December. The remainder of the funds is expected soon, as deadlines require that the State distribute the rental aid or risk having to return it to the federal government. Once Detroit receives the remainder, it will be funneled into the existing program.

"The City of Detroit and our nonprofit partners are standing by and ready to help Detroiters get through this crisis," said Julie Schneider, acting director of HRD. "Because most Detroit households will qualify, even residents who are unsure whether they meet the income threshold are encouraged to apply. We'd rather them be safe than sorry by missing out on the financial assistance available."
"The current housing crisis that we are faced with requires commitment at all levels, which makes the partnership with the City and various nonprofits essential," said Tasha Gray, executive director of HAND. "As an organization founded to provide leadership to end homelessness, we are dedicated to being a part of the solution to keep Detroiters in their housing. The CERA program is a piece of that solution."

Buildings must be free of health/safe dangers

The program also requires that in order for the landlord to receive the entire past-due funds, they are owed, the property must be free from imminent threats to health and safety. Examples include holes in the roof, lack of hot water or heat, sewage backups, vermin or black mold. Up to 50% of the amount approved for payment of past due rent may be released to the landlord if funds are needed for the repair.

"Landlords have been significantly impacted by missing rent revenue while they still have mortgages to pay, so I have some sympathy for them," said Mayor Duggan. "But if the health or safety of their tenants is at risk, making repairs has to be their first priority."

Tenant eligibility details

Detroit households may be eligible for the CERA program if they meet the following criteria:

- Your household must have experienced eligible COVID-19-related financial hardship since March 13, 2020. Qualifying examples include:
  - A member of the household has qualified for unemployment.
  - A member of the household has had at least a 10% reduction in income.
  - A member of the household has incurred significant costs of more than $500.
  - The household can demonstrate a risk of experiencing homelessness or housing instability evidenced by a past due notice for utilities or rent.
- Household income is below 80% area median income (AMI). (See chart below.)

Income	1 Person	2 People	3 People	4 People	5 People	6 People	7 People	8 People
80% AMI	44,000	50,250	56,550	62,800	67,850	72,850	77,900	82,900
50% AMI	27,500	31,400	35,350	39,250	41,400	45,550	48,700	51,850

Household Size	Maximum Total One Time Utility Payment (Includes Future Payment)	Maximum Future Utility Payment as a Credit
1-2 people	$1,500	$300
3-4 people	$2,000	$500
5+ people	$2,500	$500

Tenants earning up to 50% AMI are eligible for an additional $500 if needed to fully pay utility arrears.

EXHIBIT C

Award Activity Amounts Approved (Obligated) and Amounts Paid (Expended) During the Quarter

Total Dollar Amount of ERA Award Funds Approved (Obligated) to or for Participant Households	$123,481,221
Total Dollar Amount of ERA funds Paid (Expended) for Administrative Expenses	$8,623,742
Total Dollar Amount of ERA Award Funds Approved (Obligated) for Administrative Expenses	$45,940,175
Total Dollar Amount of ERA Award Funds Paid (Expended) for Housing Stability Services	$6,238,908
Total Dollar Amount of ERA Award Funds Approved (Obligated) for Housing Stability Services	$36,570,087

Performance & Financial Report

Performance Narrative	We started our ERA 2 funding utilization on January 1, 2022 as our state legislature did not appropriate the funds until December 2021. Our state legislature is not allowing for self-attestation of income for households. They specifically required in the appropriations boilerplate that household document their income unless they are self-employed or zero income. For ERA 1 funds, we do allow for self-attestation and had intended to do so with ERA 2, but are unable to give this flexibility to our applicants. This has led to slower approval times but most of our sub-recipients are processing applications in less than 30 days. Detroit continues to be our slowest area for service. We are working with the City leadership and our sub-recipients to speed up their processes. They are bringing on another agency to process applications, so we expect their numbers served to increase in Q1 of 2022. We do not have start dates for utility assistance cases in our data system. For the cases that we do not have start date, the date of 1/1/2022 was inputted as the start date so that the report could be uploaded and not cause an error. These cases have only a start date and no end date. We have found some minor variances in our data when comparing the Participant Household, Demographics, and Expenditures greater than $30k spreadsheets that we are attempting to isolate and resolve, but have not been able to yet to meet the reporting deadline. Some of our grantees categorized utility assistance as prospective when it should be arrears. Our number of Unique Households served for January, February and March do not sum to our total in Q1 because some households were served by the program twice within the quarter, but in different months, so they were count once for the quarter but twice in different months.
Narrative on Effective Practices	Our local non-profit agencies administering the program have established relationships with their local Legal Aid agencies and District Courts to strengthen our eviction diversion practices. They routinely share information on court dockets and program information to ensure that as many tenants and landlords are connected to the program as possible. On the state level, we have established a relationship with our State Court Administrative Office and they have been very supportive in releasing administrative orders that require the courts to promote the program and

	also provide a 45-day continuance to the court proceedings if a tenant has applied for CERA.

Federal Financial Reporting

Current Quarter Obligations	$205,991,482.60
Current Quarter Expenditures	$136,466,854.08
Cumulative Obligations to Date	
Cumulative Expenditures to Date	

Certification

Name	JENNIFER EDMONDS
Telephone	
Title	Chief COVID-19 Accountability Officer
Email	edmondsj@michigan.gov
Submission Date	4/15/2022 5:23 PM

EXHIBIT D

BRIDGE DETROIT

CIVIC AND COMMUNITY INFORMATION

Detroit City Council wants statewide housing agency to speed up rent aid applications

by **Nushrat Rahman**
April 27, 2022

(Belikova Oksana / Shutterstock.com)

Detroit City Council is urging the statewide housing authority responsible for administering millions of dollars in emergency rent aid to speed up the application process in Wayne County, where it can take

approximately 90 days to get funds approved.

Meanwhile, the Michigan State Housing Development Authority, or MSHDA, says it has hired staff to process Detroit applications and added another agency in Wayne County to help handle the volume.

Wayne County accounts for about a third of the applications that have come into the state's COVID Emergency Rental Assistance program, **according** to MSHDA, which runs the program. Detroit accounts for 19% of all applications.

The resolution, from Council President Mary Sheffield, was approved Tuesday and says the volume of applications in Wayne County demonstrates the need for rent aid dollars necessary to keep people in their homes and avoid eviction.

MSHDA communications director Katie Bach said the agency "shares the sense of urgency reflected in the resolution."

"MSHDA has communicated with our Detroit grantee, their sub-grantees and City of Detroit staff about the need to increase capacity within their system and process applications faster. We have dedicated program support specifically for Detroit grantees in an effort to expedite processing," Bach said in an email.

MSHDA has provided $277.8 million in emergency rental assistance dollars in Detroit, she said.

Ted Phillips, executive director of the Detroit-based United Community Housing Coalition, which handles applications where the tenant may be at risk of eviction, cautioned that thoroughness — rather than speed — is important when it comes to keeping people in their homes and getting aid.

"We need to be careful," Phillips said. "We need to make sure that we're dealing with court cases and making sure that the cases are resolved. We need to make sure that if people have repair issues that we're … trying to at least address those repair issues. We need to make sure … if there's potential scams going on. Things take time for a reason."

Detroit is unique because of the sheer number of applications, the eviction cases that come through the court system and the nature of housing concerns tenants have, he said.

"When you say Oakland County is processing cases faster or in Ann Arbor, you could get it quicker, well, you're not dealing with the same volume, you're not dealing with the same problems," Phillips said.

Wayne County continues to see the largest volume of applications in the state, Courtney Hierlihy, CERA director for the Wayne Metropolitan Community Action Agency, said in a Tuesday statement. In Detroit, the agency is "working each week to increase the number of applications approved" and is dealing with getting rid of duplications to get an accurate count.

"We appreciate council pushing to get CERA funding in the hands of more residents and landlords in Detroit. More than $132 million in rental assistance funds have been approved in the 13 months since CERA has launched, and that number constitutes a huge volume of work," Julie Schneider, director of the city of Detroit's housing and revitalization department, said in a statement. She said the city is working with partners to accelerate the process.

What the numbers say

As of Tuesday, Wayne County falls behind neighboring counties with the number of applications it had approved: 28,764 out of 74,704 applications, or about 39%, according to an MSHDA dashboard. Macomb County had approved about 44% of its applications. Meanwhile, Oakland County had earmarked payments to just over half of its applicants.

Both counties have a fraction of the total applications Wayne County is handling.

The county has "processed" — meaning a person has either been accepted or denied — about 55% of applications.

In Wayne County, it can take approximately 90 days for applications to get approved. In other counties, it can take anywhere from 17 to 80 days.

Across the state, 120,559 out of 237,469 — or about 51% — applications for rental and utility assistance were approved as of Tuesday. So far, Michigan has processed about 76% of applications.

About $683.5 million in rent and utilities assistance has been spent so far in Michigan. Wayne County alone has spent $219 million. That's out of roughly $1.1 billion in federal pandemic relief funds the state has received. A household, on average, is getting $5,670. More than 140,700 people have received the help.

Meanwhile, more than 45,000 applications are still "under review" across the state, meaning a caseworker is looking into it or has not gotten to it yet. More than 26,000 applications in Wayne County are in this stage.

"MSHDA has hired staff that are dedicated to processing Detroit applications," Bach said.

Currently, there are three agencies in Wayne County working on rent aid, she said. In early 2022, the United Way for Southeastern Michigan joined to help speed things up.

The CERA program, which has been running since last March, is expected to stop taking new applications in June although applications will continue to process until funds are exhausted, Bach said.

EXHIBIT E

Example of MSHDA Data Excel Sheet - HARA Reporting Total Rent Relief

Org	CERA#	Eviction?	Submitted	Decision Date	Tenant Name	Status	Reviewer	Approver
WM	205722	Yes	6/28/2021	9/22/2021	Kinicha HAWKINS	Approved	Alaa Alemari	Alaa Alemari

Landlord contact name	Street	City	Zip	House #	Unit #	County	Signature date	FundingSource
Laurence G. Wolf	E PALMER ST	DETROIT	48202	25	49	WAYNE	8/11/2021	2021 - CERA Fund #1

Total Rent Relief
8,662.00

Compare with
Para. 32 and Attachment 2 to
Declaration of Chelsea Neblett,
ECF No.55-2
PageID.2158-PageID2159
PageID.2167-PageID2171

EXHIBIT F

Neutral
As of: February 9, 2025 1:47 PM Z

PPL Energyplus, LLC v. Solomon

United States District Court for the District of New Jersey

September 28, 2012, Decided; September 28, 2012, Filed

Civil Action No.: 11-745

Reporter
2012 U.S. Dist. LEXIS 140335 *; 2012 WL 4506528

PPL ENERGYPLUS, LLC, et al., Plaintiffs, v. LEE A SOLOMON, et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by, in part, Motion denied by, in part *PPL Energy Plus, LLC v. Solomon, 2013 U.S. Dist. LEXIS 195014 (D.N.J., Jan. 18, 2013)*

Prior History: *PPL EnergyPlus, LLC v. Solomon, 2011 U.S. Dist. LEXIS 121436 (D.N.J., Oct. 20, 2011)*

Core Terms

generation, energy, electric, auction, wholesale, preemption, LCAPP Act, transmission, screen, obstacle, federal law, clearing, costs, bid, state law, reliability, regulation, preempted, state regulation, field preemption, planning, pricing, summary judgment motion, customers, public utility, Federal Power Act, violations, federal regulation, new generation, disputed fact

Counsel: **[*1]** For PPL ENERGYPLUS, LLC, PPL BRUNNER ISLAND, LLC, PPL HOLTWOOD, LLC, PPL MARTINS CREEK, LLC, PPL MONTOUR, LLC, PPL SUSQUEHANNA, LLC, LOWER MOUNT BETHEL ENERGY, LLC, PPL NEW JERSEY SOLAR, LLC, PPL NEW JERSEY BIOGAS, LLC, PPL RENEWABLE ENERGY, LLC, Plaintiffs: DAVID JOHN FIOCCOLA, MORRISON & FOERSTER LLP, NEW YORK, NY; MARA E. ZAZZALI, GIBBONS, PC, NEWARK, NJ.

For CALPINE ENERGY SERVICES L.P., CALPINE MID-ATLANTIC GENERATION, LLC, CALPINE NEW JERSEY GENERATION, LLC, CALPINE BETHLEHEM, LLC, CALPINE MID-MERIT, LLC, CALPINE VINELAND SOLAR, LLC, CALPINE MID-ATLANTIC MARKETING, LLC, CALPINE NEWARK, LLC, EXELON GENERATION COMPANY, LLC, GENON ENERGY, INC., NAEA OCEAN PEAKING POWER, LLC, Plaintiffs: LAWRENCE S. LUSTBERG, MARA E. ZAZZALI, WILLIAM P. DENI, JR., GIBBONS, PC, NEWARK, NJ.

For PSEG POWER, LLC, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Plaintiffs: MARA E. ZAZZALI, WILLIAM J. O'SHAUGHNESSY, MCCARTER & ENGLISH, LLP, NEWARK, NJ.

For ATLANTIC CITY ELECTRIC COMPANY, Plaintiff: MARA E. ZAZZALI, WILLIAM P. DENI, JR., GIBBONS, PC, NEWARK, NJ; PHILIP JOSEPH PASSANANTE, PEPCO HOLDINGS, INC, ATLANTIC CITY ELECTRIC COMPANY, NEWARK, NJ.

For LEE A. SOLOMON, in his official capacity as President of the **[*2]** New Jersey Board of Public Utilities, Defendant: ALEX MOREAU, BRIAN O. LIPMAN, LEAD ATTORNEYS, OFFICE OF THE NJ ATTORNEY GENERAL, DIVISION OF LAW, NEWARK, NJ; JENNIFER S. HSIA, LEAD ATTORNEY, NEW JERSEY OFFICE OF THE ATTORNEY GENERAL, DIVISION OF LAW, BOARD OF PUBLIC UTILITIES, NEWARK, NJ; LISA J. MORELLI, STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, TRENTON, NJ.

For JEANNE M. FOX, in her official capacity as Commissioner of the New Jersey Board of Public Utilities, Defendant: ALEX MOREAU, LEAD ATTORNEY, BRIAN O. LIPMAN, OFFICE OF THE NJ ATTORNEY GENERAL, DIVISION OF LAW, NEWARK, NJ; JENNIFER S. HSIA, LEAD ATTORNEY, NEW JERSEY OFFICE OF THE ATTORNEY GENERAL, DIVISION OF LAW, BOARD OF PUBLIC UTILITIES, NEWARK, NJ; LISA J. MORELLI, STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, TRENTON, NJ.

For JOSEPH L. FIORDALISO, in his official capacity as Commissioner of the New Jersey Board of Public Utilities, NICHOLAS V. ASSELTA, in his official capacity as Commissioner of the New Jersey Board of Public Utilities, Defendants: ALEX MOREAU, BRIAN O. LIPMAN, LEAD ATTORNEYS, OFFICE OF THE NJ ATTORNEY GENERAL, DIVISION OF LAW, NEWARK, NJ; JENNIFER S. HSIA, LEAD ATTORNEY, NEW JERSEY OFFICE **[*3]** OF THE ATTORNEY GENERAL, DIVISION OF LAW, BOARD OF PUBLIC UTILITIES, NEWARK, NJ; LISA J. MORELLI, STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, TRENTON, NJ.

For PJM INDUSTRIAL CUSTOMER COALITION, Intervenor Defendant: STEPHEN R. KERN, LEAD ATTORNEY, MCNEES WALLACE & NURICK LLC, HARRISBURG, PA.

For CPV POWER DEVELOPMENT, INC., Intervenor Defendant: SEAN J. KIRBY, LEAD ATTORNEY, SHEPPARD MULLIN RICHTER & HAMPTON LLP, NEW YORK, NY.

For NEW JERSEY, DIVISION OF RATE COUNSEL, Intervenor Defendant: BRIAN WEEKS, LEAD ATTORNEY, NEW JERSEY DIVISION OF RATE COUNSEL, NEWARK, NJ.

For NRG ENERGY, INC., NEW JERSEY POWER DEVELOPMENT LLC, Intervenors: DAVID R. KING, HERRICK, FEINSTEIN LLP, PRINCETON, NJ.

Judges: PETER G. SHERIDAN, United States District Judge.

Opinion by: PETER G. SHERIDAN

Opinion

MEMORANDUM AND ORDER

SHERIDAN, U.S.D.J.

This matter comes before the Court on three motions based upon preemption: Plaintiffs' motion for summary judgment (ECF 88); a Cross-Motion for Summary Judgment by CPV Power (ECF 98); and a motion for summary judgment by Nicholas Asselta, Joseph Fiordaliso, Jeanne Fox and Lee Solomon (the Board of Public Utilities) (ECF 100). The Court has jurisdiction because the issue arises out of the Federal **[*4]** Power Act (codified as amended *16 U.S.C. § 824 et seq.*).

On February 9, 2011, Plaintiffs, a consortium of utility companies and electric generator companies filed a complaint alleging that the Long-Term Capacity Agreement Pilot Program Act (P.L. 2011, c.9, approved Jan. 28, 2011, codified at *N.J.S.A. 48:3-51*,*48:3-98.2 to -98.4*)1 ("LCAPP Act") is preempted by the *Supremacy Clause* and the *Commerce Clause of the United States Constitution*. Plaintiffs' main contention is that the LCAPP Act violates Part II of the Federal Power Act, which provides the Federal Energy Regulatory Commission ("FERC") with exclusive jurisdiction to regulate wholesale electricity sales. More particularly, the federal question is whether the Board of Public Utilities of the State of New Jersey (BPU) was jurisdictionally preempted from approving two new gas fired generators of electricity pursuant to the LCAPP Act due to FERCcontrol.

I.

The Plaintiffs are energy related companies such as PPL Energy Plus and Calpine Energy, and some are New Jersey regulated utilities such as PSE&G and Atlantic City Electric Co. The defendants are the Commissioners of the Board of Public Utilities ("BPU"). In addition to the parties, **[*5]** the case focuses on the actions of two major entities — FERC and PJM Interconnection, LLC. For reasons unknown, neither entity is participating in this suit.

About forty years ago, Congress and leaders of corporate and governmental energy providers foresaw the need for utilities to purchase wholesale electric capacity. Evidently, purchase of future energy capacity hedges against unexpected circumstances such as extreme weather or breakdown of power plants. In this context, "capacity" is similar to energy "deposits" or "reserves." Generally, "capacity" includes commitments by generators to produce electricity when electricity is needed to meet demand. Complaint, ¶ 32.

Capacity is an important concept in the energy market due to the substantial deviations between maximum energy demand and minimum energy demand. *See* U.S. Dept. of Energy, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets*, at A.4 (May 2002), http://www1.eere.energy.gov/femp/pdfs/primer.pdf. Additionally, utilities are required by federal regulation to maintain a certain amount of capacity. Complaint, ¶ 32. As explained at oral argument, generators are " interconnected into a grid, **[*6]** and they generate power that goes onto the grid. And they also make their excess capacity available, so that at times of peak demand, capacity needs to be called on. It can be called on to deliver energy on the PJM grid." (T. 29, 24 through T. 30, 4).

To accomplish this, regional wholesale electric markets were established coordinating between different states. New Jersey is part of a regional wholesale electricity market that includes thirteen states. This market is administered by PJM Interconnection, LLC (PJM). At oral argument, PJM was defined as "a private corporation . . . it operates pursuant to a tariff . . . which is filed and approved by FERC. " (T. 29, 12-24). The FERC controls the cost of energy and wholesale capacity and some other services on the grid, which includes wholesale energy auction of PJM that is a critical part of the issue here. (T. 29, 11-16).

More particularly, the PJM market is based on the demand of retail electricity customers (residential, business and government) as calculated by PJM and load serving entities (LSE). [1] In order to serve the consumers, the LSEs purchase capacity and energy from PJM through the PJM interstate grids, and PJM is paid the capacity **[*7]** price. Generators sell their energy and capacity to PJM. The generators have no idea which LSE used the energy produced. As explained at oral argument "you just put it (energy) into PJM and the electrons go wherever and nobody traces them, the same thing is true with capacity." (T. 31, 19-21) [2].

In order to determine the price of wholesale electric capacity, PJM conducts a base rate capacity auction (sometimes referred to as BRA herein) using the "reliability pricing model" (RPM). Under this model, the LSEs and generators buy and sell capacity three years in advance at the lowest competitive price.

In PJM capacity auctions, demand for capacity is determined by the amount of electricity LSEs are expected to require in three years. The supply of capacity is determined by the bids of electric generators, with **[*8]** each generator bidding an amount of capacity it is willing to sell at the price it bids. The price of capacity is set by the intersection of supply and demand and is referred to as the "clearing price." That is, any generator that bids at or below the clearing price "clears" the auction and receives the clearing price for its capacity. Any generator that bids above the clearing price fails to "clear" the auction, and its capacity does not sell in the auction. The determination of whether generators were above the clearing price is established by PJM and is called the MOPR screen (minimum offer price rule). A generator must clear the MOPR screen in order to enter the auction where wholesale energy capacity is sold. Once the capacity is sold to PJM, and hypothetically PJM does not need a generator's capacity, the generator "still get[s] the price for having your plant standing by ready to go." (T. 31, 1-2)

After the auction occurs, then PJM submits its wholesale electric capacity price to FERC for approval as part of its tariff. For the most part, over the years FERC has approved the auction process and implementation of the RPM model as an appropriate tool to determine wholesale capacity **[*9]** price.

Although RPM, on its face, appears to be a simple point where price meets demand, it is more complex in that there are some variables or scenarios which may impact the process. One variable is that many generation plants are very old and/or antiquated and may be out of service. Apparently, the BPU has determined that such an event may likely happen, and New Jersey residents are at risk that shortages and outages could occur. Since 2007, the BPU implored PJM and FERC to change the way the auctions are conducted. As the BPU sees it, the auction price does not allow for new generation to be created because development costs can not be recouped at auction due to the MOPR screen. According to the BPU, this occurs because PJM is too inflexible, and it will not adjust the MOPR screen to factor in new development construction costs. If an unforeseen repair or upgrade becomes necessary to any one of the antiquated or old generation plants, the capacity purchased may not be available, and another generator must produce more energy. As a result, more energy must come to New Jersey from another generator, and there may be insufficient transmission equipment to convey the energy to an LSE **[*10]** in New Jersey. According to the BPU, such

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[1] It is unclear how many plaintiffs are LSEs, but there are at least two, PSE&G and Atlantic City Electric.

[2] Mr. Kleinman, attorney for Defendant CPV Power Development, acknowledged that if the LCAPP Act developed generators, only "some" of the energy produced would be returned to New Jersey in the event of a transmission failure. The point is no one knows where the energy is utilized.

circumstances are not adequately addressed through the PJM auction, because the best method to resolve the issue is through the creation of new, more local, generators.

The lack of transmission facilities is a concern of the BPU, for which there is factual support. In a hearing before the BPU, several PJM or PSE&G representatives testified about the lack of transmission facilities. *See, PSE&G application for Susquehanna-Roseland Transmission Line*, BPU Docket No. EM 9010035. Esam A. F. Khadr, Director — Electric Delivery Planning of PSE&G reviewed PJM's planning studies. Mr. Khadr agreed with PJM's finding that overloaded circuits delivering energy to New Jersey beginning in 2012 would require PJM and the transmission facility owners to "reduce transmission system voltages (brown-outs) or implement rolling black-outs for network transmission service customers." *Id.* at p. 10. In addition, Mr. Herling, Vice President of Planning for PJM prepared annual reports "to analyze the electric supply needs of customers." *Id.* at 12 (this report is abbreviated RTEP). In the 2007 RTEP, there were 23 violations identified to occur to PSE&G customers. *Id* at 13. **[*11]** Violations are various deficiencies in service and reliability. These violations are based on a "five-year and fifteen-year baseline analysis to assess compliance with reliability criteria. *Id.* Reliability refers to the delivery of electricity to customers in the amounts desired and within acceptability standards for frequency, duration and magnitude of outages and other adverse conditions or events . *Id.* at 14. Mr. Herling noted that "the PJM transmission system is rapidly reaching the point where short term incremental fixes will no longer be sufficient to mitigate identified reliability criteria violations." *Id.* at 13. These reliability findings were known since at least 2007. As a result, the BPU is concerned about whether sufficient energy will be delivered to New Jersey residents, and whether New Jersey utilities could obtain regulatory approval for construction of new transmission facilities if needed in the future. To resolve these predicaments, the BPU focused on construction of new generators whereby transmission infrastructure needs could be met, and not overburdened. The BPU posits that New Jersey's best course of action is to permit new development of local generation **[*12]** rather than struggling with transmission issues in the future. As Mr. Kleinman stated, the LCAPP Act was enacted so that New Jersey has a "predictable stream and be able to build a power plant in the State of New Jersey, which we may need if the next hurricane, the next thunderstorm, the next forest fire, the next whatever, knocks down transmission." (T. 38, 23 through T. 39, 1). The financial predicament that occurs with the BPU analysis is that new generators must finance construction costs in the amount of tens of millions of dollars. To do so, new generators can not clear the MOPR screen because their price is too high compared to older generators who do not have such finance costs. At the present time, most financial institutions will not finance new generators in New Jersey if the MOPR screen blocks new generation from competing with the other generators at the auction. PJM disagrees with the BPU assessment and argues that its auction and rules have incorporated changes which allow new generators to clear the MOPR screen when the demand exceeds capacity — but that has not yet occurred. On the other hand, the BPU contends that as time passes, and obsolescence of older generators **[*13]** increases, PJM's inaction to update generation capability will become apparent.

As noted above, the State of New Jersey and the BPU became leery about meeting energy demands of the future without relief from PJM or FERC due to the lack of transmission issues, and enacted the LCAPP Act in order to overcome that issue through the development of more local generation. On January 28, 2011, the New Jersey legislature enacted the LCAPP Act to foster new electric generation, and to provide New Jersey with new generation capacity. The LCAPP Act has several purposes. It requires a competitive selection process to foster the development of 2,000 MW of new base load or mid-merit electric power generation facilities in order to "ensure sufficient generation is available to the region, and thus to the users in the State in a timely and orderly manner." *N.J.S.A. §48:3-98.2(d)*. In addition, the statute authorized the "BPU to order New Jersey's public utilities to enter into long-term financial agreements with new generators selected by the BPU from its competitive solicitation process. *N.J.S.A. 48:3-98.2 et seq.* The law works as follows: First, the BPU selects a limited number of electric generation **[*14]** companies for entry into a pilot program [3]. The BPU bases its selections on criteria included in the Act. Second, these electric generation companies enter into irrevocable, long-term contracts with each of New Jersey's electric public utilities. These contracts, or standard offer capacity agreements ("SOCAs"), guarantee the state-selected electric generation companies a fixed price for electric capacity. In exchange for the price guarantee, the LCAPP Act requires the state-selected generation companies to sell their capacity at PJM auctions. The SOCA operates to insulate the state-selected generation companies from losses at the PJM auction who bid below the MOPR screen. Additionally, the utilities are also allegedly insulated from losses because any SOCA payment may be passed onto the New Jersey ratepayers through future rate increases.

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[3] The use of the term "pilot program" kindles notions that the State of New Jersey may consider the development of more generators if the pilot program works. Neither party has indicated that, and nothing herein speaks to that proposition.

Under the SOCA, a new generator is compelled to bid at the PJM auction "at the lowest commercially reasonable price **[*15]** under the RPM rules," i.e. clear the MOPR screen. Evidently, the SOCA sets the minimum floor capacity price, and thereafter the utilities must pay the difference between the PJM auction price and the new generator's actual costs for any applicable delivery year.

Under the LCAPP Act, LSE's (utilities) and new generators entered into SOCAs earlier this year, and each LSE signed same under protest [4]. In May, 2012, PJM held an auction in which two SOCA generators cleared the MOPR screen and bid at auction. The PJM auction price was $167.00 per megawatt/day. Under the SOCA, one selected generator will receive a guaranteed fixed price of $286.00 in its first year of operation under the SOCA (T. 13, 17-22). The difference is $119.00 (T. 24, 11-17). In addition to present SOCA payments, the guaranteed price steadily increases each year of the 15-year contract, topping off at $432.65 in the final year. Although the LCAPP Act anticipates the costs of SOCA contracts will be passed on to the utilities' ratepayer customers, the BPU acknowledges that there is no guarantee that the utilities will recover the full costs.

At oral argument, the Plaintiffs focused their presentation on wholesale capacity pricing as the main area of preempted activity; but there are other aspects of pricing over which the BPU has control and which should be mentioned. In addition to the wholesale capacity price, the BPU regulates other components of the price that consumers pay for electricity. According to Mr. Kleinman, "the utility is guaranteed that it will get from its consumers in the rates, what it needs to meet its obligations in the wholesale markets.." (T. 33, 3-7). Included in electric rates are the PJM cost (T. 33, 8), wires and connections (T. 33, 18), electrons (energy usage) (T. 33,22) and contract for differences (T. 34,1) The BPU considers all of these costs when it approves rates. The SOCA contract falls within the last category (T. 34, 6).

On November 17, 2011, FERC held hearings to review the PJM auction procedure and to determine whether any charges were required in light of the LCAPP Act. Many generators believed the LCAPP Act would undermine the competitiveness of the auction, and they requested the hearing. **[*17]** In light of same, FERC made some changes so that the competitiveness of the auction remained robust, displeasing the BPU. FERC concluded in paragraph 206:

> 206. We also reject the New Jersey Rate Counsel argument that the Commission lacks jurisdiction to subject new self-supply to a mitigated price determination that may prevent the resource from being used to satisfy a load serving entity's capacity. As pointed out with respect to the state exemption, the Commission is not infringing on the sovereignty of the state, but is merely regulating the wholesale prices charged in the capacity market. Load serving entities are free to contract with any generator they choose to supply power. The MOPR affects only the price that such a generator will be permitted to bid into the capacity market, which may affect the ultimate wholesale price to be paid to all resources, including generation, demand response, and energy efficiency.

See PJM Interconnection, L.L.C. PJM Power Providers Group v. PJM Interconnection, L.L.C., 2011 WL 5895396 (FERC). The adversity and tension between the BPU and FERC is shown within the quoted paragraph as they quarrel over whose action should take precedence when determining **[*18]** whether a competitive market (federal concern) or the planning for sufficient supply of generation (state concern) are at issue.

II.

The issue presented is whether the LCAPP Act is void due to the doctrine of preemption. Preemption arises when a state "is deprived of their power to act" because "it is in direct conflict with federal law." *O'Reilly, Federal Preemption of State and Local Law*, American Bar Association, p. 1 (2006). The preemption doctrine is rooted in the *Supremacy Clause of the United States Constitution*. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)*. It states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

In other words, preemption concerns the allocation of power between state and federal action, that is, whether state law conflicts with valid federal law. *City Of Charleston, South Carolina v. A Fisherman's Best, Inc., 310 F. 3d 155, 168 (4th Cir. 2002).* **[*19]** Federal law

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[4] The Court is uncertain what the term "under protest" means; but to the extent **[*16]** SOCA's are referred to as agreements, it is questionable whether there was a meeting of the minds.

that raises preemption may be the Constitution itself or a valid Act of Congress. *Id. at 168-69*. Regulations of a federal agency may have the same effect. *Id.* "The ultimate touchstone of preemption analysis is the intent of Congress." *Id. at 169*. The issue is not whether the Court favors a particular state or federal policy, but rather, the Court must determine whether the state action (enactment of the LCAPP Act), "interferes with or is contrary to the laws of Congress . . ." *Id. at 169*, citing *Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)*. As Justice Blackmun summed up the law:

> The circumstances in which federal law pre-empts state regulation are familiar. A pre-emption question requires an examination of congressional intent. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal **[*20]** interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U. S. 132, 142-143, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)*, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of *Congress, Hines v. Davidowitz, 312 U. S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*.'"

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (U.S. 1988) (citations omitted).

Here, the LCAPP Act is alleged to be in conflict with PJM's auction of wholesale capacity. That is, the LCAPP Act requires the SOCA generators to bid the lowest commercially reasonable price when utilities are reimbursing SOCA generators through the terms of the SOCA. In turn, the SOCA requires utilities to pay the difference between the PJM price and the gas powered generators' actual costs, if any. As a result, the question **[*21]** is whether the LCAPP Act, which allows the SOCA generator to bid below cost due to SOCA reimbursement, artificially lowers auction prices, defeating federal competitiveness concerns.

Plaintiffs allege that the LCAPP Act is preempted because it (1) intrudes on FERC's exclusive jurisdiction to regulate wholesale electricity transactions (field preemption), and (2) erects obstacles to the FERC's achievement of its regulatory goals in the wholesale electricity markets (conflict preemption). Complaint, ¶¶ 88-89. "Under the *Supremacy Clause*, federal law may supersede state law in several different ways." *Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)*. Generally it is subdivided into express or implied preemption. According to Plaintiffs, the primary issue revolves around a subcategory of implied preemption known as field preemption. Despite Plaintiffs' contention, preemption is often difficult to characterize, and the different categories of preemption are not "rigidly distinct". *N.E. Hub Partners, L.P. v. CNG Transmission Corporation, 239 F. 3d 333, 348 (3d Cir. 2001)*. *See e.g., Chamber of Commerce v. Brown, 554 U.S. 60, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008)* (field preemption); *Nash v. Florida Indus. Comm'n, 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967)*. **[*22]** Field preemption and conflict preemption involve similar, but not identical, inquiries. Field preemption exists when either "the nature of the regulated subject matter permits no other conclusion," or when "Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)*. Conflict preemption exists when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*. Either finding requires a determination of the record and context of the challenged state and federal laws. *See e.g., Pacific Gas & Elec. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-23, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983)*; *Perez v. Campbell, 402 U.S. 637, 644-48, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971)*.

Regarding preemption, both Plaintiffs and Defendants agree that Congress, by enacting the Federal Power Act, delegated exclusive authority to FERC concerning regulation of the transmission and sale at wholesale of electric energy in interstate commerce. The open question is whether the LCAPP Act intrudes on the FERC's exclusive authority, or if it is an obstacle to achieving federal objectives. In evaluating such situations, **[*23]** the Court must consider a number of factors. Professor O'Reilly enumerated the factors, as:

a. Is this a traditional area of authority exercised by the federal government?
b. Has congress expressed an intent that federal law be exclusive?
c. Is there an important traditional state interest served?
d. Do the state regulations interfere with comprehensive federal regulatory authority? and

e. Is the state regulation an obstacle to a federal goal, or what aspects of the state law directly conflict with or frustrate the accomplishment of the federal statutory objectives?

See *O'Reilly*, p. 65-75. In considering these factors, the ultimate goal is to determine Congress's intent on whether Congress sought to preempt all state action. Reviewing the factors lends some, but not conclusive, insight as to the issue.

A. Is there a traditional area of authority exercised by the federal government?

Congress granted federal authority to FERC to regulate wholesale energy capacity. The Federal Power Act reads "federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of **[*24]** electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest . . ." *16 U.S.C. § 824(a)*. Since enactment of the Federal Power Act, FERC has exercised control of pricing of wholesale energy capacity.

B. Has Congress expressed an intent that Federal law be exclusive?

Congress has never declared that the federal government would be the exclusive regulator of the transmission of electric energy. The Federal Power Act limits federal authority "to extend only to those matters which are not subject to regulation by the States." *16 U.S.C. § 824*. Here, one of those areas is state regulation of planning and/or generation of energy to supply to meet the needs of New Jersey residents. Although Plaintiffs seek to limit this matter to pricing, there is a concomitant power to make certain there is a sufficient supply of energy for New Jersey residents [5]. It appears to be a right reserved to the State in many instances.

C. Is there an important traditional State interest being served?

For years, the New Jersey legislature delegated to the BPU authority over "all services necessary for the transmission and distribution of electricity . . . including but not limited to safety, reliability . . . shall remain the jurisdiction of the BPU. The BPU shall also maintain the necessary jurisdiction with regard to the production of electricity . . . to assure the reliability of electricity . . . supply to retail customers in the State." *N.J.S.A. 48:2-13(d)*. The declaration of state policy was most likely (in some form) operative at the time of enactment of the Federal Power Act. There is little or nothing in the Federal Power Act which required the state to relinquish any of its authority over the planning or generation of a sufficient supply of electricity to either FERC or PJM. Moreover, the BPU's rationale to act is somewhat understandable in light of the statements made by PJM officials at the BPU hearing in 2007 indicating that brownouts or blackouts may result due to transmission failures by the year 2012. Although PJM's and FERC's position **[*26]** has changed about such violations of reliability for various reasons, the BPU's position has not. Here, there may be an important state interest similar to the regulation of production of gas. *See Northwest Central Pipeline Corporation v. State Corporation Commission of Kansas, 489 U.S. 493, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (1989)*.

In addition to the long term power of BPU to regulate generation planning, it also has some authority in setting the price of energy. Although PJM may set wholesale capacity price by an annual auction. The second part of the costs are set by the BPU. These costs include but are not limited to "wires and interconnections," and contracts for alternatives (SOCA). Hence, when it comes to pricing, federal and state regulators in some ways share or have concurrent authority.

The Plaintiffs argue that the doctrine of field preemption applies. "Field preemption may occur when the federal scheme of regulation of a defined field is so persuasive that Congress must have intended to have no room in that field for the state to supplement it with their own rules." *O'Reilly* at p. 70. Plaintiffs argue field preemption applies due to a federal statutory mandate for a wholesale capacity auction. *See Pacific Gas v. State Energy Resources Conserv. & Dev. Comm 'n, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983)*. **[*27]** *See also N.E. Hub Partners, L.P. v. CNG Transmission Corporation, 239 F. 3d 333 (3d Cir. 2001)*. It appears to the Court, from looking at the powers vested with FERC and with those vested in the BPU, that both have the authority to act in a manner to carry out their responsibilities to the ratepayers.

In *N.E. Hub*, FERC issued a certificate of public convenience for the construction of a natural gas storage facility in which it examined "numerous technical, safety, and environmental issues." *Id. at 336*. Pennsylvania authorities sought to revisit the issues

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[5] In addition, (and the record is not clear) PJM may consider itself as chief of planning/generation through the wholesale energy auction. My review of federal and state statutes does not show that regulation **[*25]** of planning is delegated to PJM. The issue has not been briefed.

considered by FERC. Evidently, FERC had reviewed about thirty separate issues over a long period of time concerning the construction process. Due to Pennsylvania's rehashing of FERC's previously decided issues, N.E. Hub filed suit requesting declaratory judgment that the Natural Gas Act preempted Pennsylvania's review process. One of the issues was whether the state regulatory process is susceptible of preemption by conflict or by field occupation. *Id. at 346*. That issue was remanded for review to the District Court. The Third Circuit noted:

> different categories of preemption are not rigidly distinct. Indeed, field pre-emption may be **[*28]** understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.

Id. at 348 (quoting *English v. General Elec. Co., 496 U.S. 72, 79 n. 5, 110 S.Ct. 2270, 2275 n. 5, 110 L.Ed.2d 65 (1990)*. As Judge Greenberg noted, "our ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." *N.E. Hub. at 348*, quoting *Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)*. For certain, "the dichotomy between the two types of preemption [conflict and field] is not so sharp in practical terms as the legal categorization makes it appear...." *Id.* This lack of sharpness arises here. In *N.E. Hub*, there were thirty substantive issues decided by FERC through its review process which illustrate the comprehensive nature of FERC's dominion over the construction process. In contrast, here there is one annual auction of wholesale capacity by PJM with FERC's approval of a tariff, and there are a host of other regulatory matters handled by the BPU on a daily basis including planning **[*29]** of generation supply. As a result, *N.E. Hub* is similar since it was remanded to District Court so it could find the legitimate balance of state/federal authority in the construction process.

D. Do the state regulations interfere with comprehensive federal regulatory authority and Is the State Regulation an Obstacle to Reaching a Federal Goal?

Here, the use of the word "obstacle" raises issues of fact. Generally, summary judgment is appropriate under *Fed. R. Civ. P.56(c)* when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Here, where there are three motions for summary judgment, and the parties dispute the facts of whether the LCAPP Act is an obstacle to a competitive auction.

Here, the facts determining what constitutes an obstacle required careful consideration. Some of the facts are disputed, and some other facts are derived from the opinions of experts whose conclusions have not been subject to cross-examination. The disputed facts are contained within Defendants' Statement of Material Facts (ECF No. 100-1), **[*30]** and Plaintiffs' Statement of Material Facts Precluding Judgment (ECF 124-1). Since there are disputed facts in determining whether an obstacle exists, summary judgment is inappropriate. Several examples of disputed facts are set forth below:

* Compare Paragraph 7 of Plaintiff statement which concludes "the LCAPP Act will suppress energy prices by more than $1.5 billion (ECF 124-1) with Paragraph 20 of defendants' statement which concludes "Assuming that the SOCA units engage the FERC-authorized MOPR exception process, their capacity could clear the BRA in a manner that has no adverse effect upon the competitive price produced by the auction." (ECF 100-1).

* Compare Paragraph 8 of Plaintiffs' statement which declares that "The actual effects of the LCAPP Act have already begun to distort the PJM energy and capacity market, thus interfering with FERC's market-based-rate policies. The LCAPP Act influenced Calpine's decision to forego new generation at its Edgemoor, Delaware facility" (ECF 124-1, para. 8) with Paragraph 17 of Defendants' statement where it asserts in pertinent part:

> The treatment of SOCA capacity will therefore be identical to the treatment afforded all other new generation **[*31]** capacity offered into the BRA (base rate auction), with no distinction between state-sponsored and privately developed generation capacity.

* Compare Paragraph 12 of Plaintiffs' statement wherein it claims: "the MOPR screen applies only until the generator clears one auction, after which the screen is removed entirely" with Paragraph 16 of Defendants' statement which asserts "this price mitigation will now subject SOCA capacity to the prospect of not clearing the BRA, since the increased mitigated price could likely exceed the BRA clearing price." And again in paragraph 20, when discussing "the unit-specific exception process" within the BRA it states "the generator could offer into the BRA and clear, or not clear, depending upon the final resource clearing price emerging from the

auction". (emphasis added). At any rate, how the MOPR screen actually works is an important issue to clarify; despite the fact that the evidence presented is contradictory. A factual dispute is genuine if it would affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Here all three of the above facts could affect the outcome, i.e. any one of the facts could represent an **[*32]** obstacle.

In addition to the above questions of fact, there are also the opinions of experts which must be evaluated on the basis of credibility and reliability. For instance, in paragraphs 9 and 10 of Plaintiffs' Statement of Material Facts (ECF 124-1), the testimony of Mr. Cregg is relied upon. He states:

> The LCAPP Act was a very important factor in PS Power's decision-making regarding its investments in units in PJM and that "we had a much worse market construct given LCAPP than not having LCAPP," and "current market signals suggest that it was uneconomical to build generation in New Jersey before LCAPP . . . and the LCAPP Act made this situation worse.

Mr. Cregg's conclusion is broad, and any conscientious trier of fact must assess the scope of Mr. Cregg's statement to determine its trustworthiness. To assess Mr. Cregg's statement in a summary judgment motion is inadequate. In conclusion, there are disputed facts and a need to access the trustworthiness of expert testimony. As such, all motions for summary judgment on preemption are denied. Most notably, there is an issue of fact as to whether the LCAPP Act is an obstacle to the achievement of the federal goal of a competitive auction; **[*33]** and expert testimony must be thoroughly evaluated. This is an important matter of governmental delegation of state and federal authority. The disputed facts must be resolved and the opinions of experts must be thoroughly reviewed. This is best accomplished at trial.

ORDER

For the reasons set forth in the above memorandum;

IT IS on this 28th day of September, 2012;

ORDERED that by Plaintiffs motion for summary judgment (ECF 88) is denied; and it is further

ORDERED that the Cross-Motion for Summary Judgment by CPV Power (ECF 98) is denied; and it is further

ORDERED that the motion for summary judgment by Nicholas Asselta, Joseph Fiordaliso, Jeanne Fox and Lee Solomon (the Board of Public Utilities) (ECF No. 100) is denied.

/s/ Peter G. Sheridan

PETER G. SHERIDAN, U.S.D.J.

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EXHIBIT G

Norfolk Southern Ry. v. Box

United States District Court for the Northern District of Illinois, Eastern Division

March 30, 2007, Decided ; March 30, 2007, Filed

Case No. 06 C 0641

Reporter
2007 U.S. Dist. LEXIS 23879 *; 2007 WL 1030320

NORFOLK SOUTHERN RAILWAY CO., Plaintiff, v. CHARLES E. BOX, et al., in their official capacities as Commissioners of the Illinois Commerce Commission, Defendants.

Subsequent History: Findings of fact/conclusions of law at *Norfolk Southern Ry. v. Box, 2007 U.S. Dist. LEXIS 92367 (N.D. Ill., Dec. 17, 2007)*

Core Terms

track, walkways, regulation, State Rule, ballast, roadbed, subject matter, preempted, drainage, railroad, yard, federal regulation, federal rule, preemption, train, safe, state law, adjacent, constructed, employees, railyards, carrier, hazards, employee safety, speed, safety standards, state regulation, summary judgment, safety concerns, railroad yard

Counsel: [*1] For Norfolk Southern Railway Company, a Virginia corporation, Plaintiff: Stephen Curtis Carlson, LEAD ATTORNEY, Daniel Moore Twetten, Jessica S Robinson, Sidley Austin LLP, Chicago, IL.

For Charles E Box, Lula M Ford, Robert F Lieberman, Erin M O'Connell-Diaz, Kevin K Wright, in their official capacities as Commissioners of the Illinois Commerce Commission, Defendants: Thomas A. Ioppolo, LEAD ATTORNEY, Rachel Jana Fleischmann, Illinois Attorney General's Office, Chicago, IL.; LeeAnn Richey, Peter Chadwell Koch, Office of the Attorney General, Chicago, IL.

For United Transportation Union, proposed: Lawrence M. Mann, Alper & Mann, PC, Bethesda, MD.; Patrick Joseph Harrington, Robert E. Harrington, Jr., Robert Earl Harrington, III, Harrington, Thompson, Acker & Harrington, Ltd., Chicago, IL.

Judges: Virginia M. Kendall, United States District Judge.

Opinion by: Virginia M. Kendall

Opinion

MEMORANDUM OPINION AND ORDER

The Illinois Commerce Commission adopted a regulation requiring rail carriers to provide walkways adjacent to yard tracks constructed or reconstructed after February 15, 2005 ("the State Rule"). Plaintiff Norfolk Southern Railway Co. ("Plaintiff" or "Norfolk Southern") **[*2]** seeks a declaration that this regulation is preempted by regulations promulgated pursuant to the Federal Railway Safety Act ("FRSA") ("the Federal Rules"). Plaintiff also asks this Court to enjoin the State permanently from enforcing its walkway regulation.

Norfolk Southern has moved for summary judgment on its claims. Because the Federal Rules do not cover the same subject matter as the State Rule, the State Rule is not expressly preempted under the FRSA. Additionally, genuine issues of material fact exist as to whether the State Rule will either make it impossible for Plaintiff to comply with federal requirements for track safety and structure

or stand as an obstacle to the accomplishment of the full purposes of those requirements. These disputed issues of fact preclude judgment as a matter of law on whether the State Rule is impliedly preempted because it conflicts with the Federal Rules.

General Background

Norfolk Southern is a rail carrier operating throughout the Eastern and Central United States. (SOF P 1.) Charles Box and the other defendants are Commissioners of the Illinois Commerce Commission ("ICC"). (SOF P 2.) The ICC has exclusive jurisdiction over rail carrier **[*3]** operations within the State of Illinois, except to the extent preempted by valid federal statute, regulation or order. *625 ILCS § 5/18c-7101*.

On February 12, 2003, the United Transportation Union petitioned the ICC to adopt a rule mandating that walkways be placed adjacent to tracks in Illinois. (SOF P 32.) On October 2, 2003, an ICC Administrative Law Judge held an evidentiary hearing on the Union's proposed rule. (Answer P 34.) The ALJ then issued a proposed order on January 7, 2004, concluding that the walkway rule was "not in the best interest of railroad safety" and would result in railroad tracks "which will not conform to FRA standards for track support." (SOF P 33); (Answer PP 31-38.) Before the ICC adopted or rejected the ALJ's proposed order, the General Assembly passed Public Act 093-0791. (Answer P 39.) The Act, which became effective on July 22, 2004, stated that "the [ICC] shall adopt rules requiring safe walkways for railroad workers in areas where work is regularly performed on the ground." Public Act 093-0791. The Act further provided that the "rules must include, at a minimum, a requirement that any walkway (i) have a reasonably **[*4]** uniform surface, (ii) be maintained in a safe condition, and (iii) be reasonably free of obstacles, debris, and other hazards." *Id.* Pursuant to this mandate, the ICC adopted a requirement "that rail carriers must provide walkways adjacent to those portions of yard tracks constructed after February 15, 2005 where rail carrier employees frequently work on the ground performing switching activities." *92 Ill. Admin. Code 1546.10*. The State Rule also set general requirements for the design and construction of the walkways. *See 92 Ill. Admin. Code 1546.20*; *1546.110*; *1546.120*.

The rails of a track sit on a roadbed. (SOF P 7.) The roadbed is built from the ground up, starting with the subgrade (soil and other naturally occurring materials). (*Id.*) A layer of subballast (crushed rocks) is added to the subgrade. (*Id.*) A ballast layer is then added to the subballast. (*Id.*) Ballast typically is comprised of rocks, the size of which will depend on the type of track. (SOF P 10.) The purpose of the track support, and the ballast in particular, is to keep the ties and rails in place. (SOF PP 8, 11.)

Proper drainage is a key element of track support and the safe operation of the **[*5]** railroad. (SOF P 12.) In order to provide adequate track support, the ballast must drain water from the track structure. (SOF P 14.) The size of the ballast directly affects the space available for the passage of water through the ballast section. (SOF P 19.) The larger the ballast, the larger the space between individual pieces of ballast. (*Id.*) The size of the ballast needed to facilitate proper drainage varies based on the usage of the track. (SOF P 21.) Water that cannot drain from the track structure will mix with soil in the subgrade to form mud. (SOF P 15.) The muddy ballast further restricts draining of the ballast section. (SOF P 15.)

Norfolk Southern's trains run on both mainline and yard tracks. (SOF P 37.) Mainline tracks are stand-alone tracks over which trains move at high speeds. (SOF P 37.) Yard tracks are those non-mainline tracks in railyards that are used to perform switching, maintenance, and certain other operations. (SOF P 37.) Switching operations also occur on Norfolk Southern's mainline tracks. (SOF PP 44-45.)

Standard of Review

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together **[*6]** with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. In determining whether a genuine issue of fact exists, a court must view the evidence and draw all reasonable inferences in favor of the party opposing the motion. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A court will "limit its analysis of the facts on summary judgment to evidence that is properly identified and supported in the parties' [Local Rule 56.1] statement." *Bordelon v. Chicago Sch. Reform Bd. Of Trustees, 233 F.3d 524, 529 (7th Cir. 2000)*. Where a proposed statement of fact is supported by the record and not adequately rebutted, the court will accept that statement as true for purposes of summary judgment. *See Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 887 (7th Cir. 1998)* ("*Rule 56* demands something more specific than the bald assertion of the general truth of a particular matter[;] rather

it requires affidavits that cite specific concrete facts establishing the existence **[*7]** of the truth of the matter asserted."). An adequate rebuttal requires a citation to specific support in the record, an unsubstantiated denial is not adequate. *See Albiero v. City of Kankakee, 246 F.3d 927, 933 (7th Cir. 2001)*.

Plaintiff asks this Court to "ignore any evidence not set forth by Defendants in a separately filed Local Rule 56.1(b)(3)(B) statement of additional facts." Local Rule 56.1(b)(3)(B) requires a party opposing summary judgment to file "a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific reference to the affidavits, parts of the record, and other supporting materials relied upon." Defendants appear to have done just as Local Rule 56.1(b)(3)(B) requires. Perhaps, Plaintiff is asserting that the information should have been presented under Rule 56.1(b)(3)(C) which requires "a statement, consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon." In any respect, Defendants have complied with the key component of *Local Rule 56.1* **[*8]** in that they included specific references to the evidence in the record that support their response to Plaintiff's Statement of Material Facts. Plaintiff also states that Defendants failed to put in the record the declaration from Mr. Sullivan and the deposition of Jeff McCracken. The Court received a copy of these materials on December 5, 2005 along with Defendants' Opposition. As such, all of Defendants' evidence is properly before the Court and has been considered.

DISCUSSION

The Supreme Clause of the United States Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the land." *U.S. Const., art. VI, cl. 2*. Under the *Supremacy Clause*, federal law preempts state law in three circumstances: (1) when Congress explicitly defines the extent to which its statute preempts state law ("express preemption"); (2) when state law attempts to regulate conduct in a field that Congress intended the federal government to occupy exclusively ("field preemption"); or (3) when state law actually conflicts with federal law ("conflict preemption"). *See English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990)*; **[*9]** *Gracia v. Volvo Europa Truck, N.V., 112 F.3d 291, 294-295 (7th Cir. 1997)*. With any preemption "the ultimate touchstone" is congressional purpose. *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)*.

The party advocating preemption bears the burden of proof. *See Fifth Third Bank ex rel. Trust Officer v. CSX Corp., 415 F.3d 741, 745 (7th Cir. 2005)*. Norfolk Southern argues that the State Rule regarding walkways is expressly preempted because the FRA has prescribed regulations covering this same subject matter, specifically, the area of track support and trackside material. Plaintiff additionally argues that the State Rule is preempted because it conflicts with the federal regulations by preventing proper drainage and track stability and eliminating engineering flexibility to address such track safety issues.

I. Express Preemption

"Express preemption occurs when a federal statute explicitly states that it overrides state or local law." *Hoagland v. Town of Clear Lake, Ind., 415 F.3d 693, 696-97 (7th Cir. 2005)*. *Section 434 of the FRSA* evinces congressional intent to preempt "at least some state law," but this **[*10]** Court is still required to "identify the domain expressly pre-empted by that language." *Medtronic, Inc. v. Lohr, 518 U.S. 470, 484, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)* (citation and internal quotation marks omitted); *English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990)* ("Congress can define explicitly the extent to which its enactments pre-empt state law"). This Court begins its analysis with the plain wording of the express preemption clause because it is that wording which best reflects Congress' intent. *See CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993)* ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent").

Congress enacted the Federal Rail Safety Act ("FRSA") in 1970 "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." *49 U.S.C. § 20101*. To achieve this goal, Congress gave the Secretary of Transportation broad authority "to prescribe regulations and issue orders for every area **[*11]** of railroad safety." *49 U.S.C. § 20103*. The Secretary of Transportation, in turn, delegated this authority to the FRA. *See Mich S. R.R. Co. v. City of Kendallville, 251 F.3d 1152, 1154 (7th Cir. 2001)* ("Regulations [under the FRSA] are promulgated and enforced by the Federal Railway Administration"). *Section 434 of the FRSA*, the statute's preemption clause, provides that a state law, regulation or order related to railroad safety may continue

in force "until such time as the [FRA] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." [1] **[*13]** *49 U.S.C. § 20106*; *see Shots v. CSX Transp., Inc., 38 F.3d 304, 307 (7th Cir. 1994)* ("If the Secretary promulgates a regulation that covers the subject matter of some state safety requirement, the state requirement must give way (with an inapplicable exception) even if there is no direct conflict"). A State may add to the federal requirements on a subject matter only when it "is necessary to eliminate or reduce an essentially local safety or security hazard," is not incompatible with any other federal law, regulation, **[*12]** or order, and "does not unreasonably burden interstate commerce." *49 U.S.C. § 20106*. Thus, although the FRA provides that railroad safety standards shall be nationally uniform to the extent practicable, it permits states to regulate in two circumstances: (1) when there is no federal regulation "covering" the subject matter, and (2) when it is necessary to eliminate or reduce an essentially local safety hazard. *See Easterwood, 507 U.S. at 665* ("The term 'covering' is in turn employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses"). Defendants do not contend that the State Rule addresses a local safety hazard. [2] Accordingly, the question of express preemption turns on whether federal regulations cover the same subject matter as the State Rule.

A. The State Rule

The State Rule has four sections. The first section defines the Rule's scope. It provides that rail carriers must create walkways adjacent to those portions of yard tracks, constructed or reconstructed after February 15, 2005, where rail carrier employees frequently work on the ground performing switching activities. *See 92 Ill. Admin. Code 1546.10(a)-(b)*. The second section lists the general requirements for the walkways. *See 92 Ill. Admin. Code 1546.20*. The first requirement is that the walkways be surfaced with asphalt, concrete, planking, grating, native material, crushed material, or other similar material. *See 92 Ill. Admin. Code 1546.20(a)*. When crushed material is used for the walkways, the State Rule provides that "100% of the material must be capable of passing through a 1 1/2" square sieve **[*14]** opening and 90-100% of the material must be capable of passing through a 1" square sieve opening." *Id.* Other general requirements include that the walkways must have a reasonably uniform surface, be maintained in a safe condition without compromising track drainage, have cross slopes not exceeding 1" of elevation for each 8" of horizontal length in any direction, and be a minimum width of 2 feet and be kept reasonably free of spilled fuel oil, sand, posts, rocks, and other hazards or obstructions. *See 92 Ill. Admin. Code 1546.20(b)-(e)*. The third section repeats that the State Rule applies only to "New Yard Tracks" -- those constructed or reconstructed after February 15, 2005 -- and defines "frequently" for purposes of the Rule as at least 5 days per week, 1 shift per day. *See 92 Ill. Admin. Code 1546.110(a)-(b)*.

The last section addresses when walkways may be required on "Other Tracks." *See 92 Ill. Admin. Code 1546.120(a)*. The last section allows the ICC to order the construction of a walkway on "other tracks" when "rail carrier employees who frequently work adjacent to a portion of track performing switching activities are exposed to safety hazards because of the **[*15]** lack of a walkway." *Id.* The parties disagree as to what the term "other tracks" refers. Plaintiff contends that the last section extends the requirements of the State Rule beyond the railroad yard to mainline track on which switching activities are frequently performed. Plaintiff thus reads "other" as tracks other than tracks in railroad yards. Defendants read "other" as yard tracks other than those portions of yard tracks constructed after February 15, 2005. The Court agrees with Defendants' reading. The previous (third) section is titled "New Yard Tracks" and limits the State Rule's scope to *yard* tracks *constructed after February 15, 2005*. *See 92 Ill. Admin. Code 1546.110*. The title of

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[1] Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(1) is necessary to eliminate or reduce an essentially local safety or security hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106.

[2] The question of whether the State Rule will unreasonably burden interstate commerce consequently becomes irrelevant since it arises for purposes of express preemption under the FRSA only when a State seeks to regulate a subject matter covered by federal law.

the State Rule is "Employee Walkways *in Railroad Yards.*" It is therefore reasonable to read "Other Tracks" as "Old Yard Tracks." Read in this way, the other tracks' exception allows the ICC to require walkways when it identifies a specific safety hazard caused by the lack of a walkway along yard tracks constructed before February 15, 2005, and it does not allows the ICC to order walkways be constructed along mainline tracks.

As to the subject matter of the State Rule, its title pretty **[*16]** much says it all -- "Employee Walkways in Railroad Yards." The State Rule was passed to protect rail carrier employees from being exposed to safety hazards while performing their duties alongside railyard tracks. *92 Ill. Admin. Code. 1546.120(a)*. The State Rule addressed this safety concern by requiring that rail carriers provide walkways adjacent to those portions of yard tracks where rail carrier employees frequently work on the ground performing switching activities. The Court thus turns to whether any federal law, regulation or order covers this same subject matter.

B. The Federal Rules

Pursuant to its delegated authority, the FRA adopted a set of "Track Safety Standards." *See 49 C.F.R. §§ 213.1-213.241*; *§ 213.1* ("This part prescribes minimum safety requirements for railroad track that is part of the general railroad system of transportation"). Broadly speaking, the safety standards deal with such issues as train speed (*§ 213.9*), track repair, maintenance and inspection (*§§ 213.11*, *213.231*), roadbeds (*§ 213.31*), track geometry (*§ 213.51*) and track structure (*§ 213.101*). Defendant asserts that the regulations dealing **[*17]** with roadbed and track structure cover the same subject matter as the State Rule.

Subpart B of the Track Safety Standards "prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed." *49 C.F.R. § 213.31*. Specifically, it requires that roadbeds must have adequate drainage [3] **[*18]** and that vegetation on railroad property must be controlled. [4] Subpart D, titled Track Structure, "prescribes minimum requirements for ballast, crossties, track assembly fittings, and the physical conditions of rails." *49 C.F.R. § 213.101*. With regards to ballast, the Federal Rules require that it: (i) transmit and distribute the load of the track, (ii) restrain the track, (iii) provide adequate drainage, and (iv) maintain proper track crosslevel, surface, and alinement. *See 49 C.F.R. § 213.103*.

1. FRA Regulation of Employee Safety

In addition to the track safety regulations, Defendant points to a FRA policy statement issued in 1978 wherein the FRA asserted that OSHA ("Occupational Safety and Health Administration") regulations would not apply to walkways because walkways "are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." *43 Fed. Reg. 10,587*. The FRA stated further that it would "determine **[*19]** the need for and feasibility of general standards to address individual hazards related to such surfaces." *Id.* Even prior to 1978 though, the FRA looked at the issue of employee safety near tracks during its proposed rule-making procedures. First, in 1971, the FRA proposed to adopt § 213.39 as part of its track

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[3] Each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned. *49 C.F.R. § 213.33*.

[4] Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not--

(a) Become a fire hazard to track-carrying structures;

(b) Obstruct visibility of railroad signs and signals:

(1) Along the right-of-way, and

(2) At highway-rail crossings;

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communication lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

49 C.F.R. § 213.37.

safety standards: "If an object or hazardous condition within 10 feet of the center line of track impedes the safe passage of equipment or prevents railroad employees from safely performing their duties, the owner of the track shall remove the object or correct the hazardous condition or give appropriate warning notification." *36 Fed. Reg. 11,976*. After receiving comments regarding the proposed regulation, the FRA concluded that it should not be adopted, "because its language was . . . too vague to constitute an effective safety standard." *36 Fed. Reg. 20,336*. Next, in 1975, the FRA proposed to adopt railroad occupational safety and health standards. *40 Fed. Reg. 10,693*. The standards were to cover the roadway -- track, roadbed, track appliances, and related devices, rolling stock, railroad yards and terminals, signal and communication **[*20]** devices and railroad support facilities. *Id.* The FRA decided that it would issue its occupational safety and health regulations through a series of proposed rules, rather than in one giant undertaking. *41 Fed. Reg. 29,153*-54. The first, and seemingly only, proposed rule contained standards governing means of egress from buildings and structures in case of emergency, general environmental controls and fire protection. *Id.* Finally, in 1976, the FRA solicited comments on whether it should adopt regulations requiring walkways on trestles and bridges. *41 Fed. Reg. 50,302*. The FRA decided against such a regulation, finding that the costs of the regulation would outweigh the benefits of a nationwide requirement of walkways on those structures. *42 Fed. Reg. 22,184*-85. The FRA concluded that "if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a state agency that is in a better position to assess local need is the more appropriate response." *Id.*

2. Prior Caselaw on State Walkway Requirements

A number of courts have addressed the issue of whether federal **[*21]** regulation of roadbed, track structure and employee safety preempt state walkway requirements. Some of these courts held that state regulations covering walkways are preempted because walkways are an integral part of the track support and roadbed structure. *See, e.g., Norfolk and Western Ry. Co. v. Burns, 587 F. Supp. 161, 169 (D. Mich. 1984)* ("Insofar as rails and track surface, including cross ties and ballast and all adjacent switches and appurtenances are concerned, this court has no trouble in concluding that the federal regulations do treat this subject matter, that they treat it comprehensively, and that there has been a clear indication of an attempt to regulate in these areas in a manner which would preempt state regulation"); *Black v. Seaboard System R.R., 487 N.E.2d 468, 469 (Ind. Ct. App. 1986)* ("Although unsafe walkways have not been the subject of specific federal regulations . . . [w]alkways are a part of the track structure and rail system that in general present an area preempted by the [FRA]"). Other courts did not read the track safety standards so broadly. These courts found against preemption because neither the track support **[*22]** or roadbed regulations nor any other FRA regulatory action dealt with the issue of employee safety near railroad tracks. *See, e.g., Grimes v. Norfolk Southern Ry. Co., 116 F. Supp. 2d 995, 1002-03 (N.D. Ind. 2000)* ("The regulations are directed toward creating a safe roadbed for trains, not a safe walkway for railroad employees who must inspect the trains"); *Elston v. Union Pacific R. Co., 74 P.3d 478, 488 (Colo. App. 2003)* ("These standards are directed at promoting a safe roadbed for trains, but offer no indication whether a railroad has a duty to provide safe walkways for employees alongside its tracks"); *Southern Pac. Transp. Co. v. Pub. Util. Com'n of State of Cal., 647 F. Supp. 1220, 1226 (N.D. Cal. 1986)*, *aff'd Southern Pacific Transp. Co. v. Public Utilities Com'n of State of Cal., 820 F.2d 1111 (9th Cir. 1987)*; *Illinois Cent. Gulf R. Co. v. Tennessee Public Service Com'n, 736 S.W.2d 112, 116 (Tenn. App. 1987)*.

The Fifth Circuit took a separate approach to the issue. The Court rejected the notion that federal track safety regulations necessarily preempted a state walkway requirement, but found **[*23]** that a walkway requirement would cover the same subject matter "if, from a practical standpoint, the width, surface and slope requirements of the state walkway regulation generally add to the FRA standards by requiring the railroad to strengthen or enlarge the roadbed beyond FRA requirements." *Missouri Pacific R. Co. v. Railroad Com'n of Texas, 833 F.2d 570, 575-76 (5th Cir. 1987)* ("*Mopac I*"). The Fifth Circuit, as has every court, also rejected the argument that the FRA's 1978 Policy Statement or any other rulemaking action outside of the track safety standards preempted state regulation of walkways. *See, e.g., Mopac I, 833 F.2d at 576*; *Southern Pac. Transp. Co., 647 F. Supp. at 1225*; *Norfolk and Western Ry. Co., 587 F. Supp. at 169*.

3. Coverage of the Federal Rules

Determining whether federal regulations cover a particular subject matter is a difficult and uncertain task. *Accord Union Pac. R.R. Co. v. California Pub. Util. Comm., 346 F.3d 851, 864 (9th Cir. 2003)* ("The standard for 'covering' under the FRSA is not easy"). For federal regulations to "cover" the same subject matter, they **[*24]** must do more than "touch upon" or "relate to" the state regulation's subject matter. *Id.* Instead, "preemption will lie only if the federal regulations substantially subsume the subject matter

of the relevant state law." *Id.* In determining the subject matter covered by federal law a court must examine not just one particular regulation but all "related safety regulations" and "the context of the overall structure of the regulations." *Id.; see Burlington Northern and Santa Fe Ry. Co. v. Doyle, 186 F.3d 790, 797 (7th Cir. 1999)* ("[A]s Easterwood teaches, we have to examine all related regulations and orders to see if the FRA has determined [the issue]"). Plaintiff argues that the State Rule is preempted based upon: (1) the FRA's prior regulation of employee safety and walkways, and (2) the fact that the overall structure of the track safety regulations cover the same subject matter as the State Rule, specifically, track support and trackside material.

In *Easterwood,* the Supreme Court addressed the extent to which the FRSA preempted a Georgia law for operating a train at an excessive speed. *Id. at 661*. *Section 213.9(a) of the FRSA* set maximum allowable **[*25]** operating speeds for freight and passenger trains depending on the class of track on which they traveled. The plaintiff contended that the speed limits should be read as a ceiling for a train's speed but should not preclude further state regulation addressing the specific hazards caused by track conditions such as grade crossings. *Id. at 674-75*. In response, the Court noted that related regulations focused on giving appropriate warnings at grade crossings given variations in train speed. *Id. at 674*. These regulations required the installation of signaling devices and automatic gates to ensure safety at grade crossings. *Id.* Thus, when placed within the overall structure of the regulations, the Court found that "the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation." *Id. at 674*.

The FRA has never exercised this jurisdiction to regulate walkways or employee safety in the areas immediately adjacent to railroad tracks. By adopting the its 1978 Policy Statement, the FRA sought to assert its jurisdiction over employee safety in railroad surfaces to the exclusion of OSHA, not necessarily to limit the states' ability **[*26]** to also regulate. *See Southern Pacific Transp. Co., 647 F. Supp. at 1226* ("[T]he Policy Statement attempted to delineate the respective jurisdictions of the FRA and OSHA. It did not purport to limit state jurisdiction"); *Norfolk and Western Ry. Co., 587 F. Supp. at 169* ("The court finds this statement by the federal agency itself to be extremely persuasive of the fact that there is a clear recognition that there is a role for the states to play in this regulatory scheme").

Section 434 of the FRSA permits state action in the face of federal inaction. *See Union Pacific R. Co. v. California Public Utilities Com'n, 346 F.3d 851, 868 (9th Cir. 2003)* ("Because the FRA merely deferred making a rule, rather than determining that no regulation was necessary, the state can legitimately seek to fill this gap"); *Doyle, 186 F.3d at 801* ("When the FRA examines a safety concern regarding an activity and affirmatively decides that no regulation is needed, this has the effect of being an order that the activity is permitted"). For example, in *Doyle,* a Wisconsin regulation required that at least two crew members be on a train **[*27]** when it was moving. *Doyle, 186 F.3d at 796-804*. The regulation applied to three types of one-person crew operations: hostling movements, helper movements, and over-the-road movements. *See id. at 801*. The Wisconsin regulation was found preempted as to one-person crews for hostling and helper operations because the FRA had considered and determined safety issues related to having one-person crews perform each of these operations. *Id.* Instead of requiring multiple person crews, the FRA enacted a regulation permitting a lone engineer, but only if certain condition were met. *Id. at 799*. As to over the-road operations, the railroad had argued that because the FRA was aware of the safety concern but had not acted, the FRA must approve of the operations as safe. *Id. at 802*. Yet, the Court held that because the FRA was still studying the issue, the FRA's consideration of one-person crews for over-the-road operations had not "taken on the character of an affirmative decision to do nothing," and Wisconsin was free to require two-person crews for over-the-road operations. *Id. at 802*.

The FRA has not made **[*28]** an affirmative determination that walkways should not be permitted in the area adjacent to railroad tracks nor has it determined that the concern for employee safety in that area can be better regulated in a different manner. [5] *See Dowe v. Nat'l R.R. Passenger Corp., 2004 U.S. Dist. LEXIS 11377, 2004 WL 887410, *5 (N.D. Ill. 2004)* (FRA's regulatory

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[5] Phil Olekszyk, former FRA Deputy Associate Administrator for Safety, testified that during his tenure, the FRA delivered a consistent message that the track safety standards preempted state rules with regard walkways. (Olekszyk Dep. at 59-60.) He also testified that the FRA often responds to complaints from railroad workers about walkway conditions. (*Id.* at 100-05.) Given the absence of formal decisionmaking by the FRA on the issue and the lack of any guidelines for compliance, Olekszyk's testimony does not show that the FRA had completed the decisionmaking process and that it's position on walkways was "absolutely clear." *Atchison, Topeka & S. F. R.R. v. Pena, 44 F.3d 437, 441 (7th Cir. 1994) (en banc), aff'd. sub nom. Brotherhood of Locomotive Engineers v. Atchison, T. & S. F.R.R., 516 U.S. 152, 116 S. Ct. 595, 133 L. Ed. 2d 535 (1996)* (not addressing issue of "final agency action"); *Franklin v. Massachusetts, 505 U.S. 788, 797, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992)*. Consequently, the FRA's actions do not constitute a regulation or order as needed to preempt a state regulation under *§ 434*.

determination to leave specifics of training programs to railroads preempted state regulation of training programs); *In re Derailment Cases, 416 F.3d 787 (8th Cir. 2005)* (preemption applied to a negligent inspection claim when the safety issues giving rise to that claim were addressed in federal regulations); *CSX Trans., Inc. v. Williams, 365 U.S. App. D.C. 331, 406 F.3d 667, 671-72 (D.C. Cir. 2005)* (state regulation preempted where DOT intentionally gave transporter flexibility to solve safety concern). The only statements from the FRA to date indicate a future intent to deal with the issues of walkways and employee safety in the area adjacent to railyard tracks. Even the 1977 order which declined to adopt a federal rule for bridge walkways appears to suggest that future regulation of the issue may be best addressed by the states. *See* **[*29]** *42 Fed. Reg. 22,185* ("[I]f an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a State agency that is in a better position to assess the local need is the more appropriate response"). As the Seventh Circuit instructed in *Doyle,* where the FRA has not "considered [the] subject matter and made a decision regarding it," a state can "fill gaps where the Secretary [of Transportation] has not yet regulated." *Doyle, 186 F.3d at 795*. Thus, unless the FRA track structure and roadbed regulations cover the subject, the State Rule is not preempted. *See Mopac I, 833 F.2d at 576* ("[T]he FRA's statement implies that unless walkway regulations are otherwise preempted, *e.g.,* by FRA track and roadbed regulations that 'cover the subject matter,' *§ 434* could authorize state regulation until the FRA acts"). Therefore, the Court turns its attention to the subject matter of the regulation.

[*30] *Sections 213.31* and *213.101* of the Federal Rules prescribe minimum requirements for roadbed and areas immediately adjacent to roadbed and for track structure. The Seventh Circuit has stated that "the subject matter of the state requirement is the safety concerns that the state law addresses." *Doyle, 186 F.3d at 796*. The State Rule addresses safety concerns faced by rail carrier employees while they perform their duties along railyard tracks. None of the federal track safety regulations cover employee safety in the area adjacent to the tracks. As Plaintiff's evidence and arguments indicate, the federal regulations are designed to ensure a stable track structure and safe roadbed for the train:

> The ballast regulations . . . are designed to insure that tracks have adequate support. The regulations dealing with vegetation on or near roadbeds are designed to insure that employees can perform necessary maintenance work. No FRA regulation addresses the concern that employees have a safe working environment near railroad tracks.

Southern Pac. Transp. Co., 647 F. Supp. at 1225; *see Illinois Cent. Gulf R. Co., 736 S.W.2d at 116* **[*31]** ("[T]he subject matter of safe walkways has not been dealt with in the track safety standards"); *but see Pierce v. Chicago Rail Link, L.L.C., 2005 U.S. Dist. LEXIS 44905, 2005 WL 599980, *12 (N.D. Ill. 2005)* ("[C]ertain aspects of the regulations were created at least in part to protect railroad employees like [plaintiff] who perform trackside duties"). A certain tension arises in this case though between this "safety concern" approach and the Supreme Court's earlier admonition that "[s]ection 434 does not, however, call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter of train speed." *Easterwood, 507 U.S. at 675*. *Easterwood* indicates that if federal regulations in fact covered the subject matter of walkways, the FRA's purposes in enacting them would be irrelevant. In spite of its admonition, the Court determined that the speed limits were set with safety concerns in mind and concluded that *§ 213.9* covered "the subject matter of train speed *with respect to track conditions, including the conditions posed by grade crossings." Id.* (emphasis added); **[*32]** *see Waymire v. Norfolk and Western Ry. Co., 218 F.3d 773, 776 (7th Cir. 2000)* (describing *Easterwood* as holding that "the preemption clause does not require an inspection of the regulation's motivation, and, even if it did, the structure of the regulations showed that they were adopted with safety in mind").

Assuming that this Court should not factor in the FRA's purpose, the question then becomes whether the federal regulations *in fact* cover the subject matter of employee walkways in railyards. Plaintiff argues that walkways are effectively part of the track structure and roadbed and, therefore, a subject matter covered by federal regulation. A walkway is located near the ballast supporting the tracks and roadbed, is constructed of materials commonly used in track support and may affect the drainage or stability of the tracks and roadbed depending upon its location and design. *See Illinois Cent. Gulf R. Co., 736 S.W.2d at 116* ("Since walkways alongside the track are necessarily a part of the roadbed, and since a walkway touches and concerns ballast and crossties, it is possible to conclude that any federal regulation dealing with these subjects **[*33]** has preempted a state regulation concerning walkways"). Plaintiff also points to the fact that the typical design of Norfolk Southern's railyards would cause the walkways to be placed atop existing track structure. (Affidavit of Jeffrey A. McCracken ("McCracken Aff.") at P 28.)

Sections 213.31 and *213.101* describe the scope of the regulations contained in subparts B and D, but critically do not themselves contain any prescriptions. *See Easterwood, 507 U.S. at 669* (distinguishing federal regulations that are descriptive, which do not preempt state law, from those that are prescriptive, or that affirmatively require or allow certain safety measures, which preempt state law). The prescriptive regulations pertaining to roadbed involve adequate drainage and vegetation control. The track structure

regulations prescribe standards separately for ballast, crossties, track assembly fittings, and the physical conditions of rails. *See* 49 C.F.R. §§ 213.103 - 213.143. The ballast regulation requires that the ballast used to support the track must transmit and distribute the load of the track, restrain the track, provide adequate **[*34]** drainage and maintain proper track crosslevel, surface, and alinement. *See* 49 C.F.R. § 213.103. Employee walkways are not among the matters that the FRA considered or decided in setting the minimum requirements for track structure and roadbeds. *See* Doyle, 186 F.3d at 795 ("For preemption, the important thing is that the FRA considered a subject matter and made a decision regarding it"). And unlike *Easterwood,* there is no indication that the roadbed requirements not only establish a floor, but also preclude additional state regulation. Easterwood, 507 U.S. at 674. To conclude that the federal regulations substantially subsume the State Rule because it may affect track structure and roadbed would ignore the relatively narrow definition afforded the term "cover." [6] *See* Easterwood, 507 U.S. at 665 (comparing "cover" to terms used in other express preemption clauses); *Medtronic, 518 U.S. at 485* (presumption against preemption applies to determining the scope of express preemption clause). At best, the federal regulations "relate to" or "touch upon" the subject matter of the State Rule, **[*35]** a relationship not strong enough to invoke the express preemption clause of the FRSA. *See* Easterwood, 507 U.S. at 665. Accordingly, any affect that the State Rule has on ballast or roadbed requirements is measured properly through the actual conflict it creates with the federal regulations, not as evidence that it is a subject matter covered by the Federal Rules.

II. Implied (Conflict) Preemption

State law is impliedly preempted to the extent that it actually conflicts with federal law. State law conflicts with federal law "when it is **[*36]** impossible to comply with both state and federal law" or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984); *see also* Freightliner Corp. v. Myrick, 514 U.S. 280, 289, 115 S. Ct. 1483, 131 L. Ed. 2d 385 ("At best, Cipollone [Liggett Group, Inc., 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)] supports an inference that an express pre-emption clause forecloses implied preemption; it does not establish a rule"). Congress passed the FRSA for the purpose of promoting rail safety and making laws, regulations and orders related to railroad safety "nationally uniform to the extent possible." 49 U.S.C. §§ 20101, 20106. In terms of this case, a conflict exists if the State Rule prevents Norfolk Southern from complying with the drainage and track stability requirements of the Federal Rules or if the State Rule unduly restricts the manner in which Norfolk Southern can construct its railroad yards in compliance with the Federal Rules. In reviewing the evidence, the Court does so in light of its finding that the State Rule applies only to newly **[*37]** constructed or reconstructed yard tracks and not mainline tracks.

Plaintiff submitted the reports of Dr. Donald Uzarski ("Uzarski") and Jeffrey McCracken ("McCracken") in support of its position that the State Rule affects proper drainage and track stability and eliminates the flexibility that is central to the Federal Rules. Defendants submitted a report from Richard Inclima ("Inclima") in response.

McCracken serves as Norfolk Southern's Chief Engineer Line Maintenance West. (McCracken Aff. at P 1.) In that capacity, he oversees the construction, maintenance and operation of Norfolk Southern's railroads in fourteen states, including Illinois. (*Id.*) He has spent a total of 29 years working at various posts in the rail system. (*Id.* at P 2.) McCracken's affidavit initially covers the track engineering basics discussed in this opinion's general background. (*Id.* at PP 5-18.) McCracken then discusses the particular design used in Norfolk Southern's railroad yards. A single Norfolk Southern railyard may have up to 50 tracks running parallel. (*Id.* at P 21.) Norfolk Southern typically configures its yards so that the center lines of the parallel tracks are 14 feet apart. **[*38]** (*Id.* at P 22.) And since the ties Norfolk Southern uses are 8 1/2 feet long, there is 5 1/2 feet between the ends of the ties of parallel tracks. (*Id.*) Norfolk Southern routinely places 6 inches of ballast extending outward from and level with the ties in order to provide adequate track support. (*Id.* at P 23.) For railyards, 9 inches of ballast is placed below the bottom of the ties. (*Id.*) Under this track configuration, the track structure extends 7 feet from the center line of each track and 2 feet and 9 inches from the ends of the ties, where the ballast meets the sloping ballast section of the parallel track at the subballast. (*Id.*) This configuration of ballast restrains yard tracks' ties and rail laterally, longitudinally, and vertically and facilitates proper drainage. (*Id.*) Under this configuration, the track structures of parallel tracks consume the entirety of the space between those tracks. (*Id.* at P 27.) Any walkway adjacent to a railyard track would necessarily have to sit atop the track structure that is already regulated by the FRA. (*Id.* at P 28.)

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[6] It is not clear even whether the federal regulations would prohibit direct state regulation of subjects such as ballast size, which is not specified in 49 C.F.R. § 213.103, since §§ 213.31 and 213.101 "prescribe minimum requirements." *See* Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344, 359, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000) (Breyer J., concurring) ("[F]ederal *minimum* safety standards should not preempt [state law]").

Additionally, the slope and ballast requirements of the State Rule will affect the drainage **[*39]** and stability of the tracks. (*Id.* at PP 29-30.) McCracken explained during his deposition the major concern he sees with the State Rule: "So therefore, the only way you could meet this two-foot level walkway with no more than eight-to-one slope is to fill the tracks in if they were level from the head of the tie to head of tie level across, so that you can have two feet, and that way, you would destroy your drainage, you would bury up all your drainage structures, and you could not comply unless you did this. . . . It could not exist without completely redoing the yard, lowering tracks, raising tracks, making major changes, so that it can exist under FRA." (Deposition of Jeffrey McCracken ("McCracken Dep.") at 71-72.)

Uzarski is a visiting lecturer in the Railroad Engineering Program at the University of Illinois Urbana-Champaign since 1994. (Report of Donald R. Uzarski ("Uzarski Rep.") at 2.) Uzarski led the railroad engineering asset management research program at the U.S. Army Construction Engineering Research Laboratory for over twenty years before he retired in 2004. (*Id.*) Uzarski opines that the State Rule will have a profound effect on critical elements of track support **[*40]** such as drainage, lateral track stability and vertical track stability. (*Id.* at 4.) As to drainage, he first contends that "[p]utting a walkway of some type on top of or abutting that ballast (i.e. on top of the subballast) will likely act as a dam, reducing the amount of water that was previously capable of draining." (*Id.*) When questioned on the statement during his deposition, Uzarski answered that the dam problem would not result if the same size ballast were being used throughout the track structure and shoulder. (Deposition of Donald R. Uzarski ("Uzarski Dep.") at 77-82.) Uzarski also points out that drainage is negatively affected when smaller ballast is utilized because less water can pass between the smaller sized ballast and because the smaller ballast fouls more easily. (Uzarski Rep. at 4.); (*see* McCracken Aff., P 2 ("In the railroad industry, when ballast becomes obstructed, it is said to have 'fouled.")). The State Rule requires 100% of ballast to be less than 1 1/2 inches square and at least 90 percent of the ballast to be less than 1 inch square. (*Id.*) According to McCracken, Norfolk Southern already uses 3/4 inch ballast in its railyards. (*Id.* **[*41]** at P 18; McCracken Dep. at 6869.) As such, the State Rule likely will not force Norfolk Southern to use smaller ballast in its railyards.

Drainage also is affected by the degree of slope of the roadbed. (Uzarski Rep. at 5.) The State Rule may require a different slope for the roadbed. (*Id.*) In his deposition, Uzarski could not say for certain though that the slope requirements of the State Rule would cause drainage problems in railyards. (Uzarski Dep. at 94.) He also stated that if most railyard tracks have a flat cross slope, the likely impact on drainage would be further diminished. (Uzarski Dep. at 92.) As to lateral and vertical track stability, Uzarski focuses on his premise that larger ballast is more stable. (Uzarski Rep. at 6.) When questioned, he could cite no studies proving larger ballast was more stable and could not say that the ballast required by the State Rule would create a safety hazard. (Uzarski Dep. at 95-100.)

Finally, Uzarski states that the State Rule dramatically reduces the flexibility afforded to railroad engineers when they are designing and constructing track and roadbed. (Uzarski Rep. at 7.) In his deposition, Uzarski could not explain his related **[*42]** statement that the State Rule runs counter to good engineering practices. (Uzarski Dep. at 104-06.) Uzarski eventually acknowledged that "Oh, I think you can certainly design a safe rail yard, and you certainly can apply State Rule and have a safe rail yard, but it's more than just safety. Again, we are talking about construction costs." (Uzarski Dep. at 106.)

Richard Inclima is currently the Director of Safety and Education for the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters ("BMWED"). (Report of Richard A. Inclima ("Inclima Rep.") at 1.) Inclima passed the appropriate testing and training requirements to be "qualified and designated" by the carrier, in accordance with *49 C.F.R. § 213.7*, to perform track inspection, institution remedial action and conduct track restoration and renewal under traffic per FRA regulation. (*Id.*) During his career, Inclima supervised a number of large scale track restoration projects, including the complete restoration of rail yards. (*Id.*) Inclima performed and supervised the construction of many structures adjacent to tracks including walkways and grade crossings. **[*43]** (*Id.*) Inclima also has fifteen years of experience with railroad regulatory matters as Director of Safety and Education for the BMWED. (*Id.*) In his capacity as Director, Inclima represented BMWED on the Rail Safety Advisory Committee ("RSAC") Working Group and various task forces which developed the recommendations resulting in the 1998 revisions to the Federal Track Safety Standards, 49 C.F.R. § 213. (*Id.*) Inclima's primary opinions are that walkways are not, and would not become, part of the track structure and that the State Rule does not conflict with the Federal Rules. (*Id.* at 2.) Inclima supports these conclusions largely through his own interpretations ofthe Track Safety Standards and the State Rule.

A fact is genuinely in dispute when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Viewing the witness' reports, deposition testimony and supporting materials in favor of Defendants, a reasonable factfinder could conclude that the State Rule will not prevent Norfolk Southern from complying with the Federal Rules regarding ballast and roadbed **[*44]** -- particularly, drainage and stability -? in their newly constructed and re-constructed railroad yards. Additionally, a reasonable factfinder could conclude that the

State Rule does not unduly limit Norfolk Southern's ability to address these safety concerns. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (summary judgment is proper when no reasonable juror could find for the nonmovant). These facts are also material since their resolution will determine if the State Rule is impliedly preempted because it conflicts with the Federal Rules. *See* *Patel v. Allstate Ins. Co., 105 F.3d 365, 370 (7th Cir. 1997)* ("An issue of fact is 'material' if it is outcome determinative"). Accordingly, genuine issues of material fact exist.

The Court understands the unique posture of this case, in that it will act as the finder of fact at trial. *Accord* *Patton v. MFS/Sun Life Financial Distributors, Inc., 480 F.3d 478, 2007 U.S. App. LEXIS 5715, 2007 WL 730577, *5 (7th Cir. 2007)* ("If on a certain record a district court believes a party is entitled to summary judgment, then the same court, if required to conduct a bench trial on that same record, will probably **[*45]** decide the case for that same party"). Nevertheless, the Court believes it will be more appropriate to decide this case based upon a record developed at an adversarial hearing. *See* *Casey v. Uddeholm Corp., 32 F.3d 1094, 1099 (7th Cir. 1994)* ("[T]he district court improperly weighed evidence in this case in arriving at its decision to grant summary judgment. . . . [T]he appropriate proceedings for such fact-finding is a bench trial and not the disposition of a summary judgment motion"). At that trial, the parties should focus on the extent to which the State Rule prevents Norfolk Southern from complying with the Federal Rules. And the extent to which the State Rule frustrates that FRSA's goals of promoting safety and uniformity.

Conclusion and Order

Because the Federal Rules do not cover the same subject matter as the State Rule -? employee walkways in railroad yards -? the State Rule is not expressly preempted under the FRSA. Also, genuine issues of material fact exist as to whether the State Rule conflicts with the Federal Rules. Wherefore, Plaintiff's Motion for Summary Judgment is denied.

So ordered.

Virginia M. Kendall, United States District **[*46]** Judge

Northern District of Illinois

Date: March 30, 2007

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EXHIBIT H

Hovey v. Cook Inc.

United States District Court for the Southern District of West Virginia, Charleston Division

March 26, 2015, Decided; March 26, 2015, Filed

CIVIL ACTION NO. 2:13-cv-18900

Reporter
2015 U.S. Dist. LEXIS 38201 *

MARY HOVEY, Plaintiff, v. COOK INCORPORATED, et al., Defendants.

Subsequent History: Later proceeding at *Hovey v. Cook Inc., 2015 U.S. Dist. LEXIS 38205 (S.D. W. Va., Mar. 26, 2015)*

Summary judgment denied by *Hovey v. Cook Inc., 2015 U.S. Dist. LEXIS 42657 (S.D. W. Va., Apr. 1, 2015)*

Core Terms

reliability, causation, expert testimony, disclosure, studies, scientific, patients, products, methodology, inflammation, articles, testing, expert report, inflammatory, chronic, pelvic, expert opinion, animal, argues, chronic inflammation, implanted, witnesses, contends, sling, surgeries, biologic, mesh, supporting authority, peer-reviewed, compliance

Counsel: [*1] For Mary Hovey, Plaintiff: Benjamin H. Anderson, LEAD ATTORNEY, ANDERSON LAW OFFICES, Cleveland, OH; Erin K. Copeland, LEAD ATTORNEY, FIBICH LEEBRON COPELAND BRIGGS JOSEPHSON, Houston, TX.

For Cook Incorporated, Cook Biotech, Inc., Cook Medical Inc., Defendants: Dale W. Eikenberry, Douglas B. King, James M. Boyers, Jennifer Lynn Schuster, LEAD ATTORNEYS, WOODEN & MCLAUGHLIN, Indianapolis, IN.

Judges: JOSEPH R. GOODWIN, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSEPH R. GOODWIN

Opinion

MEMORANDUM OPINION & ORDER

(***Daubert* Motions**)

Pending before the court are the following motions brought by the defendants: (1) Motion to Exclude the Opinions and Testimony of Donald Kreutzer, Ph.D. [Docket 30]; (2) Motion to Exclude the Opinions and Testimony of Lisa Morici, Ph.D. [Docket 32]; and (3) Motion to Exclude the Opinions and Testimony of Daniel S. Elliott, M.D. [Docket 36].

Also pending before the court are the following motions brought by the plaintiff: (1) Motion to Exclude General Liability/Causation Testimony of Anthony Atala, M.D. [Docket 24]; (2) Motion to Exclude General Liability/Causation Testimony of Mickey Karram, M.D. [Docket 25]; (3) Motion to Exclude General Liability/Causation Testimony of Dennis Metzger, Ph.D. **[*2]** [Docket 26]; (4) Motion to Exclude the Testimony of Dr. Stephen Park Rhodes [Docket 27]; (5) Motion to Exclude Expert Testimony of Improperly Designated Employees [Docket 28]; and (6) Motion to Exclude General Liability/Causation Testimony of Robert L. Long, M.D. [Docket 29].

For the reasons discussed below, defendants' Motion to Exclude the Opinions and Testimony of Donald Kreutzer, Ph.D. [Docket 30] is **DENIED**; defendants' Motion to Exclude the Opinions and Testimony of Lisa Morici, Ph.D. [Docket 32] is **GRANTED in part** and **DENIED in part**; defendants' Motion to Exclude the Opinions and Testimony of Daniel S. Elliott, M.D. [Docket 36] is **DENIED**; plaintiff's Motion to Exclude General Liability/Causation Testimony of Anthony Atala, M.D. [Docket 24] is **DENIED**; plaintiff's Motion to Exclude General Liability/Causation Testimony of Dennis Metzger, Ph.D. [Docket 26] is **DENIED**; plaintiff's Motion to Exclude the Testimony of Dr. Stephen Park Rhodes [Docket 27] is **GRANTED**; and plaintiff's Motion to Exclude Expert Testimony of Improperly Designated Employees [Docket 28] is **DENIED**. It is further **ORDERED** that Cook provide the plaintiff with expert compensation information for Dr. Atala and updated **[*3]** disclosures for its corporate experts within **seven days** of the entry of this Memorandum Opinion and Order. Finally, the court **RESERVES** judgment on plaintiff's Motion to Exclude General Liability/Causation Testimony of Mickey Karram, M.D. [Docket 25] and plaintiff's Motion to Exclude General Liability/Causation Testimony of Robert L. Long, M.D. [Docket 29].

I. Background

This case against Cook Incorporated, Cook Biotech, Inc., and Cook Medical, Inc. (collectively "Cook") resides in one of seven MDLs assigned to me by the Judicial Panel on Multidistrict Litigation concerning the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI").[1] In the seven MDLs, there are more than 70,000 cases currently pending, approximately 350 of which are in the Cook MDL, MDL 2440. In this particular case, the plaintiff, Mary Hovey, was surgically implanted with the Stratasis TF Urethral Sling ("Stratasis"), a pelvic repair product made of SIS material that Cook manufactures to treat SUI. (Compl. [Docket 1] ¶ 27). Ms. Hovey received her surgery at Christus Spohn Hospital Shoreline in Corpus Christi, Texas, on May 15, 2003. (*Id.*). She now claims that **[*4]** as a result of the implantation of the Stratasis, she has "suffered permanent injuries and significant pain and suffering, emotional distress, lost wages and earning capacity, and diminished quality of life." (*Id.* ¶ 1). Ms. Hovey advances the following causes of action against Cook: failure to warn under the Product Liability Act, strict liability, negligence, negligent misrepresentation, negligent infliction of emotional distress, breach of express warranty, breach of implied warranty, violation of consumer protection laws, gross negligence, unjust enrichment, and punitive damages. (*Id.* ¶¶ 44-133). The parties have retained experts to render opinions regarding the elements of these causes of action, and the instant motions involve the parties' efforts to exclude or limit the experts' opinions pursuant to *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

II. Legal Standard

Under *Federal Rule of Evidence 702*, expert testimony is admissible if the expert is "qualified . . . by knowledge, skill, experience, training, or education," and if his testimony is (1) helpful to the trier of fact in understanding the evidence or determining a fact in issue; (2) "based upon sufficient facts or data"; and (3) "the product of reliable principles and methods" that (4) have been reliably applied "to the facts of the case." *Fed. R. Evid. 702*. The U.S. Supreme Court established a two-part test to govern the admissibility of expert testimony under *Rule 702*—the evidence is admitted if it "rests on a reliable foundation and is relevant." *Daubert, 509 U.S. at 597*. The proponent of expert testimony does not have the burden to "prove" anything to the court. *Md. Cas. Co. v. Therm-O-Disk, Inc., 137 F.3d 780, 783 (4th Cir. 1998)*. He or she must, however, "come forward with evidence from which the court can determine that the proffered testimony is properly admissible." *Id.*

The district court is the gatekeeper.[2] It is an important role: "[E]xpert witnesses have the potential to be both powerful and quite misleading[;]" the court must "ensure that any and all scientific testimony . . . is not only relevant, but reliable." *Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001)* (citing *Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999)* and *Daubert,*

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[1] In the interest of clarity, I note that the pelvic repair products manufactured by Cook do not contain polypropylene mesh like most of the products at issue in the other MDLs before this court. Rather, Cook manufactures its products using a biologic material made from porcine small intestinal submucosa ("SIS"), (Compl. [Docket 1] ¶ 5), which, in layman's terms, is the tissue from **[*5]** the small intestine of a pig.

[2] With more than 70,000 cases related to surgical pelvic repair products currently pending before me, this gatekeeper role takes on extraordinary significance. Each of my evidentiary determinations carries substantial weight with the remaining MDL cases. Regardless, while I am cognizant of the subsequent implications of my rulings in these cases, I am limited to the record and the arguments of counsel.

509 U.S. at 588, 595). In carrying out this role, I "need not determine **[*6]** that the proffered expert testimony is irrefutable or certainly correct"—"[a]s with all other admissible evidence, expert testimony is subject to testing by 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *United States v. Moreland, 437 F.3d 424, 431 (4th Cir. 2006)* (quoting *Daubert, 509 U.S. at 596*); *see also Md. Cas. Co., 137 F.3d at 783* (noting that "[a]ll *Daubert* demands is that the trial judge make a 'preliminary assessment' of whether the proffered testimony is both reliable . . . and helpful").

Daubert mentions specific factors to guide the court in making the overall reliability determinations that apply to expert evidence. These factors include (1) whether the particular scientific theory "can be (and has been) tested"; (2) whether the theory "has been subjected to peer review and publication"; (3) the "known or potential rate of error"; **[*7]** (4) the "existence and maintenance of standards controlling the technique's operation"; and (5) whether the technique has achieved "general acceptance" in the relevant scientific or expert community. *United States v. Crisp, 324 F.3d 261, 266 (4th Cir. 2003)* (quoting *Daubert, 509 U.S. at 593-94*).

Despite these factors, "[t]he inquiry to be undertaken by the district court is 'a flexible one' focusing on the 'principles and methodology' employed by the expert, not on the conclusions reached." *Westberry, 178 F.3d at 261* (quoting *Daubert, 509 U.S. at 594-95*); *see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* ("We agree with the Solicitor General that '[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.'") (citation omitted); *see also Crisp, 324 F.3d at 266* (noting "that testing of reliability should be flexible and that *Daubert*'s five factors neither necessarily nor exclusively apply to every expert").

With respect to relevancy, *Daubert* further explains:

> Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful. The consideration has been aptly described by Judge Becker as one of fit. Fit is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated **[*8]** purposes. . . . *Rule 702*'s helpfulness standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Daubert, 509 U.S. at 591-92 (internal citations and quotation marks omitted).

Finally, in several of the instant *Daubert* motions, a specific scientific methodology comes into play, dealing with differential diagnoses or etiologies. "Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Westberry, 178 F.3d at 262*. The Fourth Circuit has stated that:

> A reliable differential diagnosis typically, though not invariably, is performed after "physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests," and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely.

Id. A reliable differential diagnosis passes scrutiny under *Daubert*. An unreliable differential diagnosis is another matter:

> A differential diagnosis **[*9]** that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation. However, "[a] medical expert's causation conclusion should not be excluded because he or she has failed to rule out every possible alternative cause of a plaintiff's illness." The alternative causes suggested by a defendant "affect the weight that the jury should give the expert's testimony and not the admissibility of that testimony," unless the expert can offer "no explanation for why she has concluded [an alternative cause offered by the opposing party] was not the sole cause."

Id. at 265-66 (internal citations omitted).

Ultimately, the district court has broad discretion in determining whether to admit or exclude expert testimony, and the "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Cooper, 259 F.3d at 200* (quoting *Kumho Tire, 526 U.S. at 152*).

Before I review these motions, I begin by addressing two arguments that apply to many of the parties' *Daubert* objections. Unless otherwise necessary, I will not address these objections again specific to each challenged expert. First, as I have **[*10]** maintained

throughout these MDLs, I will not permit the parties to use experts to usurp the jury's fact-finding function by allowing an expert to testify as to a party's state of mind or on whether a party acted reasonably. *See, e.g.,* *Huskey v. Ethicon, Inc., 29 F. Supp. 3d 691, 702-03 (S.D. W. Va. 2014)*; *Lewis et al. v. Ethicon, Inc., 2:12-cv-4301, 2014 U.S. Dist. LEXIS 15351, 2014 WL 186872, at *6, *21 (S.D. W. Va. Jan. 15, 2014)*; *In re C. R. Bard, Inc., 948 F. Supp. 2d 589, 611, 629 (S.D. W. Va. 2013)*. Although an expert may testify about his or her review of internal corporate documents solely for the purpose of explaining the basis for his or her opinions—assuming the opinions are otherwise admissible—a party's knowledge, state of mind, or other matters related to corporate conduct and ethics are not appropriate subjects of expert testimony because opinions on these matters will not assist the jury.

Second, "opinion testimony that states a legal standard or draws a legal conclusion by applying law to the facts is generally inadmissible." *United States v. McIver, 470 F.3d 550, 562 (4th Cir. 2006)*. I have diligently applied this rule to previous expert testimony, and I continue to adhere to it in this case. I will not parse the expert reports and depositions of each expert in relation to these same objections. I trust that able counsel in this matter will tailor expert testimony at trial accordingly. Having addressed these universal objections, I now turn to **[*11]** Cook's *Daubert* motions.

III. Cook's *Daubert* Motions

In this case, Cook seeks to exclude the expert opinions of Donald Kreutzer, Ph.D., Lisa Morici, Ph.D., and Daniel S. Elliott, M.D.

A. Motion to Exclude the Opinions and Testimony of Donald Kreutzer, Ph.D.

Dr. Kreutzer is a professor of surgery and the director of the Center for Molecular Tissue Engineering at the University of Connecticut School of Medicine. (Kreutzer Report [Docket 30-1], at 1). His current research focuses on immunology, inflammation, and wound healing, specifically in the area of tissue response to surgically implanted devices, including biologic surgical mesh. (*Id.* at 2-3).[3] Cook objects to the following opinions set forth in Dr. Kreutzer's expert report: (1) Injuries to women implanted with Cook products were caused "by a lack of quality control in Cook's product testing, manufacturing, and physician and patient product warnings"; (2) Cook products "cause excessive scarring and inflammation"; (3) "Cook did not conduct adequate testing of the products at issue"; (4) "Cook did not have adequate quality assurance procedures for the sourcing and manufacturing of the products"; and (5) Cook "did not adequately educate and warn patients and physicians on the products." (Cook's Mot. to Exclude the Ops. & Test. of Donald Kreutzer, Ph.D. [Docket 30], at 1-2). Cook also asks the court to exclude Dr. Kreutzer's opinions on Cook's corporate knowledge, **[*12]** motives, or intent, as well as any opinions in the form of legal conclusions. (*Id.* at 2).

The plaintiff clarifies that Dr. Kreutzer will not render the first, third, fourth, or fifth opinions listed above. (Pl.'s Opp. to Cook's Mot. to Exclude the Ops. & Test. of Donald Kreutzer, Ph.D. [Docket 48], at 4 (confirming that Dr. Kreutzer will not testify as to the opinions challenged by Sections III(A), (C), (D), and (E) of Cook's memorandum)). Furthermore, the plaintiff has confirmed that Dr. Kreutzer will not testify about Cook's state of mind, intent, or knowledge, nor will he make legal conclusions at trial. Instead, Dr. Kreutzer will limit his testimony to his opinion that Cook's products cause inflammation, scarring, and tissue damage. In light of this clarification, I review Cook's *Daubert* challenge to this opinion only, and I **DENY as moot** the remainder of its motion concerning Dr. Kreutzer.

Cook moves to exclude Dr. Kreutzer's opinion that the inflammatory response to biologic mesh is "chronic" **[*13]** and "excessive" on the grounds that this opinion lacks a reliable basis.[4] In Cook's view, none of the scientific or medical studies cited by Dr. Kreutzer validate a finding of excessive or chronic inflammation of tissue, and as such, these studies cannot provide a scientific foundation for his opinion that meets the standards of *Daubert*. I do not agree with this reasoning. As an initial matter, Cook's interpretation of these articles as unrelated to excessive inflammation is, to put it mildly, subject to debate. Indeed, several of the

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[3] Cook has moved to preclude the plaintiff from referring to Cook's SIS products as "mesh." (Cook's Initial Mots. *in Limine* [Docket 70], at 32). I will address this motion at a later time, and for purposes of this Memorandum Opinion and Order, I simply refer to the product in the way that the respective expert has referred to it.

[4] Cook does not appear to challenge Dr. Kreutzer's expertise with respect to this opinion. In any event, given Dr. Kreutzer's extensive education and experience in immunology and immunopathology, (*see* Kreutzer Report [Docket 30-1], 2-4 (listing Dr. Kreutzer's education, publications, professorships, and research in these areas)), I find him qualified to opine on the inflammatory response to biologic mesh.

articles, some written by Dr. Kreutzer himself, report findings of excessive inflammation resulting from the use of SIS material in vivo. (*See, e.g.*, Cook's Ex. 4, J.E. König et al., *Severe postoperative inflammation following implantation of a Stratasis sling*, Urology (2004) (concluding that the inflammatory reactions experienced by a woman implanted with a SIS pelvic repair product were "severe" and "considerable"); Pl.'s Ex. 3, D.L. Kreutzer et al., *Comparative analysis of histopathologic responses to implanted porcine biologic meshes*, Pub. Med. (2014) (finding "pronounced inflammatory responses" after a twelve-week study of the impact of biologic mesh **[*14]** on tissue); *see also* Kreutzer Report [Docket 30-1], at 3-4 (listing his research publications on biologic mesh)). And although none of the articles expressly describe the inflammation as "chronic" or "long-term," one could reasonably conclude, as Dr. Kreutzer does, that the results of the short-term studies signify that the inflammation could persist indefinitely. (*See* Kreutzer Dep. [Docket 48-2], at 87:17-20 (explaining his work, *Activation of Human Mononuclear Cells by Porcine Biologic Meshes in Vitro*, in which Dr. Kreutzer compared different graft materials in vitro and discovered certain "hallmark cells that are present, particularly in chronic inflammation," and "[are] associated with these grafts in chronic inflammation")).

To be sure, the conclusions reached in the articles do not seamlessly align with the conclusions proffered by Dr. Kreutzer. But, **[*15]** as demonstrated above, the articles relied upon by Dr. Kreutzer could plausibly be interpreted in a way that supports his opinions on chronic and excessive inflammation. The "analytical gap between the data and the opinion," if any, is not so great that the opinions must fall under *Daubert*. *See* *Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*. Put simply, Cook's *Daubert* motion against Dr. Kreutzer boils down to a debate over the correct way to construe the scientific studies. As the gatekeeper of expert testimony, however, I must not concern myself with the "correctness of the expert's conclusions" and should instead focus on the "soundness of his methodology." *Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1318 (9th Cir. 1995)* ("*Daubert II*"); *see also* *United States v. Moreland, 437 F.3d 424, 431 (4th Cir. 2006)* ("The court need not determine that the proffered expert testimony is irrefutable or certainly correct."). Here, Dr. Kreutzer considered and analyzed scientific articles and studies—some of which he authored—to reach his opinion that the implantation of biologic materials can cause chronic and severe inflammation. Thus, seeing no challenge to the methodologies used in the studies, I find that they provide a reliable, scientific basis for Dr. Kreutzer's opinions. *See* *Monsanto Co. v. David, 516 F.3d 1009, 1015 (Fed. Cir. 2008)* ("[N]umerous courts have held that reliance on scientific test results prepared by others **[*16]** may constitute the type of evidence that is reasonably relied upon by experts."). Any inconsistencies or discrepancies in his testimony go to its weight, not its admissibility, and Cook is free to capitalize on these matters during cross-examination. *See* *Daubert, 509 U.S. at 596* ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

Cook also makes the blanket argument that "Dr. Kreutzer provided no testimony that would indicate his opinions are generally accepted by the scientific community." (Mem. in Supp. of Mot. to Exclude the Ops. & Test. of Donald Kreutzer, Ph.D. [Docket 31], at 7). While general acceptance "remains an important consideration" in evaluating expert testimony, this factor alone cannot necessitate or forbid exclusion. *United States v. Crisp, 324 F.3d 261, 268 (4th Cir. 2003)*. As the Fourth Circuit explained,

> [t]he *Daubert* decision, in adding four new factors to the traditional "general acceptance" standard for expert testimony, effectively opened the courts to a broader range of opinion evidence than was previously admissible. Although *Daubert* attempted to ensure that courts screen out "junk science," it also enabled the courts to entertain new and less conventional forms of expertise. As the Court **[*17]** explained, the addition of the new factors would put an end to the "wholesale exclusion [of expert testimony based on scientific innovations] under an uncompromising 'general acceptance' test." *Daubert, 509 U.S. at 596*.

Id. at 268. Therefore, I do not find the general-acceptance factor as determinative here, given that Dr. Kreutzer's methodology in reaching his opinions is otherwise reliable. *See, e.g., Daubert II, 43 F.3d at 1322 n.11* ("Of course, the fact that one party's experts use a methodology accepted by only a minority of scientists would be a proper basis for impeachment at trial."). Cook's Motion to Exclude the Opinions and Testimony of Donald Kreutzer, Ph.D., [Docket 30] is accordingly **DENIED**.

B. Motion to Exclude the Opinions and Testimony of Lisa Morici, Ph.D.

Cook next moves to exclude the opinions of Dr. Lisa Morici, an immunologist and assistant professor of microbiology and immunology at Tulane University School of Medicine. In this case, Dr. Morici offers opinions on the use of porcine SIS biomaterials for treatment of POP and SUI, as well as "the complications resulting from transvaginal insertion and use," such as

"foreign body reaction, acute and chronic inflammatory responses, acute and chronic infections, mesh erosion, degradation, **[*18]** [] weakening, and graft rejection and failure." (Morici Report [Docket 45-2], at 4). Cook objects to several portions of Dr. Morici's expert report. These objections fail for the same reasons explained in the court's opinion with respect to Dr. Kreutzer.

First, Cook challenges the reliability of Dr. Morici's opinion that Cook's products induce foreign body reaction. Cook states that Dr. Morici's opinions "go[] beyond the findings of the literature on which she relies." (Mem. in Supp. of Mot. to Exclude the Ops. & Test. of Lisa Morici, Ph.D. ("Cook's Mem. re: Morici") [Docket 33], at 7). Then, Cook proceeds to critique some of the cited articles, maintaining that animal studies and case reports cannot support an expert opinion on causation. While I agree that animal studies and case reports do not by themselves conclusively "demonstrate causation between SIS and foreign body reactions in patients," (Reply Mem. in Supp. of Mot. to Exclude the Ops. & Test. of Lisa Morici, Ph.D. ("Cook's Reply re: Morici") [Docket 56], at 7), it does not follow, as Cook suggests, that an expert's reliance on these works renders her opinion inadmissible under *Daubert*, especially when she has relied on other sources to reach the opinion. **[*19]** *See, e.g.*, *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 222, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991)* (White, J., concurring) ("[T]he [lower] court should not have discounted the evidence as 'speculative' [citation omitted] merely because it was based on animal studies. . . . "); *Rider v. Sandoz Pharm. Corp., 295 F.3d 1194, 1199 (11th Cir. 2002)* (stating that case reports "may support other proof of causation," even if they "alone ordinarily cannot prove causation").

In *Decker v. GE Healthcare Inc.,* for example, the Sixth Circuit affirmed the district court's decision to admit an expert's theory over a *Daubert* motion, given that the expert based his theory on "research conducted by scientists and doctors performing animal studies, *in vitro* studies, *in vivo* studies, human clinical studies and retrospective case studies along with review of the relevant published scientific and medical studies[.]" *770 F.3d 378, 392-93 (6th Cir. 2014)*.[5] Dr. Morici has similar research to back her opinions. First, she performed laboratory tests on rats, exposing them to SIS contaminated with live bacteria to evaluate its behavior *in vivo*. She observed "intense inflammatory response." (Morici Report [Docket 45-2], at 12-13). These results, as Dr. Morici explains in her report, "characterize" the foreign body reaction and are mirrored by animal tests performed by other researchers. (*See id.* at 6-8 (referring to the Petter-Puchner study performed **[*20]** on rats and the Rabah et al. study performed on rabbits, both of which reported foreign-body-like reactions that resulted in chronic inflammation)). Dr. Morici also considered a study performed on humans, in which the authors "showed SIS to be the most inflammatory biologic material when tested against human donor cells *in vitro* and *in vivo* in the rat model. . . . And, as I mentioned, [inflammatory reactions] are the hallmarks of the foreign body response." (Morici Dep. [Docket 45-3], at 139:19-140:5 (citing to the Bryan et al. study from 2012)). Finally, Dr. Morici referred to case studies that reported foreign body response to a sling made from SIS material. (*Id.* at 7-8 (citing to the Ho study and the John et al. study)).

Taken together, Dr. Morici has a well-rounded, scientific basis for her opinion that SIS products induce foreign body reactions. Her theory has been tested, by **[*21]** herself and others, as explained above, and the studies she relies upon have been subjected to the peer-review process. (*See generally* Morici Report [Docket 45-2]). This is enough to get through *Daubert*'s gates. *See Daubert, 509 U.S. at 594-95* (holding that in reviewing expert testimony, the "overarching subject is the scientific validity"); *Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001)* (explaining that whether a theory has been tested and whether it has been subjected to peer review, among other considerations, "may bear on a judge's determination of the reliability of an expert's testimony"). The fact that "differing research findings" exist or that "foreign body reactions are 'highly variable,'" (Cook's Reply re: Morici [Docket 56], at 8), goes to the weight of testimony and can be addressed during cross-examination of Dr. Morici. *United States v. Moreland, 437 F.3d 424, 431 (4th Cir. 2006)* ("[Under *Daubert*, t]he court need not determine that the proffered expert testimony is irrefutable or certainly correct.").

Cook raises similar objections to Dr. Morici's opinion that Cook products induce a chronic inflammatory response. Dr. Morici defines "chronic inflammation" as inflammation lasting three months or more. (Morici Dep. [Docket 45-3], at 52:22-25). Cook argues that none of the studies relied on by Dr. Morici report such persistent **[*22]** inflammation in humans. Dr. Morici, however, identified several such studies during her deposition. The Franklin study followed patients who had received SIS implants over five years and reported the presence of seromas, which, in Dr. Morici's view, "would indicate an imbalance in the tissue" and therefore chronic inflammation. (*Id.* at 183:21-184:8). The Uneo study, which followed patients for fifteen months, reported a recurrence rate of 30%, and in Dr. Morici's opinion, the recurrence could likely have been caused by chronic inflammation. (*Id.* 184:3-18). Dr.

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[5] In *Decker*, the expert's theory was that gadolinium-based contrast agents used to produce MRI images can cause nephrogenic systemic fibrosis. *Decker, 770 F.3d at 383-84*. This causation opinion is analogous to Dr. Morici's opinion in this case—that SIS material can cause a foreign body reaction and subsequent tissue inflammation—and as such, I find the *Decker* case instructive.

Morici also referred to several internal studies performed by Cook, which collected data on patient complications for over two years and, from Dr. Morici's understanding, indicate the presence of chronic inflammation in these patients. (*Id.* at 185:3-16 ("[A]s an immunologist I have a difficult time reconciling that there's [sic] complications without inflammation.")).

While the conclusions reached in these tests do not seamlessly align with the conclusions proffered by Dr. Morici, as was the case with Dr. Kreutzer, *Daubert* does not require such precision. Rather, the *Daubert* inquiry is a "flexible one" that must be based "solely on **[*23]** principles and methodology, not on the conclusions that they generate." *Daubert, 509 U.S. at 580*. Here, Dr. Morici reached her opinions about chronic inflammation based on her experience and work as an immunologist, as well as her reasoned interpretation of scientific, peer-reviewed literature. Other courts have accepted this methodology as reliable, *see Monsanto Co. v. David, 516 F.3d 1009, 1015 (Fed. Cir. 2008)* (listing relevant cases), and in regard to Dr. Morici, I concur with these courts.

Finally, Cook argues that "Dr. Morici is not qualified to critique the procedures employed in preparing Cook's Biodesign products as she has no knowledge or expertise in this area." (Cook's Mem. re: Morici [Docket 33], at 10). The plaintiff agrees that Dr. Morici should not testify regarding this matter, given that she "could not testify, with certainty, that the problems with SIS mesh that she cites are the result of these manufacturing issues." (Pl.'s Opp. to Mot. to Exclude the Ops. & Test. of Lisa Morici, Ph.D. [Docket 45], at 10). But the plaintiff asks that the court allow the testimony if "defendants open the door to it." (*Id.*). I decline to make this reservation. Dr. Morici has not demonstrated experience in the field of product manufacturing or in the preparation of biomaterials for sale, as the plaintiff willingly admits, and as such, I **EXCLUDE** any testimony on this matter. *See Fed. R. Evid. 702* (allowing **[*24]** for expert opinions if the witness "is qualified as an expert by knowledge, skill, experience, training, or education"). I **GRANT** Cook's motion on this limited issue. The motion is otherwise **DENIED**.

C. Motion to Exclude the Opinions and Testimony of Daniel S. Elliott, M.D.

Cook seeks to exclude the expert opinions of Daniel S. Elliott, M.D. Dr. Elliott is an Associate Professor of Urology at the Mayo Clinic Graduate School of Medicine in Rochester, Minnesota. Broadly, Dr. Elliott opines that SIS-based products cause a foreign body reaction, which leads to inflammation and contraction and results in acute and chronic pain. (Pl.'s Opp. to Cook's Mot. to Exclude the Ops. & Test. of Daniel Elliott, M.D. ("Pl.'s Opp. re: Elliott") [Docket 46], at 3). Specifically, Cook seeks to exclude the following expert opinions offered by Dr. Elliott: (1) SIS causes chronic inflammation which results in chronic pelvic pain, vaginal pain, and chronic dyspareunia; (2) SIS may cause an allergic and hypersensitive response, including delayed hypersensitivity; (3) One may extrapolate that contraction of SIS causes pain; and (4) Cook's prelaunch studies and IFU were inadequate. (Cook's Mot. to Exclude the Ops. & Test. of Daniel S. Elliott, M.D. [Docket 36], at 1-2).

1. *Unsupported by the Evidence* ***[*25]***

First, Cook argues Dr. Elliott's opinion that SIS causes chronic inflammation, which results in chronic pain, is inadmissible because it is not supported by the evidence. (Cook's Mem. in Supp. of Mot. to Exclude the Ops. & Test. of Daniel S. Elliott, M.D. ("Cook's Mem. re: Elliott") [Docket 37], at 4). Although Dr. Elliott cites multiple scientific articles in support of his inflammation opinions, Cook contends these opinions are unreliable because none of the studies reporting inflammation in humans was long-term. As both parties have made clear through the briefing, there is simply not the same amount of scientific literature available on SIS as there is on other treatments, such as those involving polypropylene mesh. Dr. Elliott used the available literature, which provides evidence of an inflammatory response, to support his theory that "[o]nce the inflammatory process begins, a cascade of events will occur which lead[s] to pelvic muscle pain and nerve irritation." (Elliott Report [Docket 46-1], at 35-36). Furthermore, Dr. Elliott's inflammation opinions are also based on his clinical experience with women whose bodies have rejected SIS products, as well as his own patients. (Pl.'s Opp. re: Elliott [Docket 46], at 5). On cross-examination, Cook may certainly highlight **[*26]** the fact that Dr. Elliott relied on short-term studies. However, this argument does not sufficiently undermine the reliability of Dr. Elliott's methodology under *Daubert.*

With regard to Dr. Elliott's opinions on allergic response and contraction, Cook objects to his reliance on studies that did not look specifically at Cook products. However, "expert testimony need not be based upon identical case studies or epidemiological data." *Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1384 (4th Cir. 1995)* (citing *City of Greenville v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987))* (internal quotation marks omitted). I agree with the plaintiff "that the defendant should not be allowed to escape liability simply . . . because there are, as yet, no epidemiological studies concerning the health risks associated with" SIS products. *Id.* At this stage, I will allow Dr. Elliott's "extrapolations" because they are based on reliable data and he utilizes methodologies typically

applied in his field. *See* Doe v. Northwestern Mut. Life Ins. Co., No. 2:10-cv-02961, 2012 U.S. Dist. LEXIS 60441, 2012 WL 1533104, at *4 (D.S.C. May 1, 2012) (permitting extrapolation, "especially in the areas of cutting edge science"). Accordingly, Cook's motion with regard to Dr. Elliott's inflammation, allergic response, and contraction opinions is **DENIED**.

2. Scientific Literature

Next, Cook contends that Dr. Elliott fails to consider **[*27]** and account for contrary scientific literature. (Cook's Mem. re: Elliott [Docket 30], at 10). Cook's argument on this issue consists mostly of a summary of various articles, which in no way assists the court's *Daubert* determination. Furthermore, as the plaintiff points out, these articles are not cited by any of Cook's experts in their reports, which leads me to question their significance. (*See* Pl's Opp. re: Elliott [Docket 46], at 12). In *Tyree v. Boston Scientific Corporation*, I found Dr. Margolis's methodology unreliable because he rejected numerous studies without *any* scientific basis for doing so. *See* F. Supp. 3d , 2014 U.S. Dist. LEXIS 148312, [WL] *7 (S.D. W. Va. 2014), *available at* 2014 WL 5320566. Here, Dr. Elliott provided a declaration detailing his review and subsequent rejection of the nine articles Cook discusses in its *Daubert* motion. (*See generally* Decl. of Dr. Daniel S. Elliott, M.D. [Docket 38-18]). The literature cited in Dr. Elliott's original report demonstrates sufficient indicia of reliability, and whether Dr. Elliott failed to review these particular articles goes to the weight of his testimony, not its admissibility. Dr. Elliott's declaration further forecloses Cook's argument. Accordingly, Cook's motion with regard to scientific literature is DENIED.[6]

3. Knowledge, Motive, or Intent

Next, Cook argues that Dr. Elliott may not testify concerning company knowledge, motive, or intent. (Cook's Mem. re: Elliott [Docket 37], at 16). The plaintiff concedes that Dr. Elliott will not testify about (1) Cook's state of mind, intent or knowledge; or (2) legal standards or legal conclusions. (Pl.'s Opp. re: Elliott [Docket 46], at 14). Accordingly, Cook's motion with regard to knowledge, motive, or intent is DENIED as moot.[7]

4. *Product Warnings and Labeling*

Next, Cook contends Dr. Elliott is not qualified to opine on product warnings or labels.(Cook's Mem. re: Elliott [Docket 37], at 18). In response, the plaintiff explains that "Dr. Elliott will not discuss defendants' warnings in a regulatory context." (Pl.'s Opp. re: Elliott [Docket 46], at 15). Instead, "Dr. Elliott's report identifies particular risks with SIS biomaterials and explains that the IFU and defendant's product literature fails to disclose these risks." (*Id.*). I agree with the plaintiff that a urologist like Dr. Elliott is qualified to make this comparison. *See* Wise v. C. R. Bard, Inc., No. 2:12-cv-01378, 2015 U.S. Dist. LEXIS 14869, 2015 WL 521202, at *9-10 (S.D. W. Va. Feb. 7, 2015) (finding a urogynecologist qualified to opine on product labeling based on his knowledge and clinical experience); *see also* Huskey v. Ethicon, Inc., 29 F. Supp. 3d 691, 719 (S.D. W. Va. 2014) (finding a urologist qualified to opine on the risks of implanting a product and whether those risks were adequately expressed on the product's IFU). Relying on the plaintiff's assurance that Dr. Elliott's testimony will be limited to an evaluation of Cook's warnings based on his knowledge of and clinical experience with the risks of SIS products—and **[*30]** not on FDA requirements or regulations—Cook's motion with regard to product warnings and labeling is **DENIED**.

5. Adequacy of Testing

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[6] As discussed more fully *infra* related to Dr. Atala, any supplemental information **[*28]** must be disclosed at least thirty days before trial. Fed. R. Civ. P. 26(e). Dr. Elliott's declaration [Docket 46-18] was filed on February 19, 2015, and is timely. Therefore, I consider it along with his original expert report.

[7] Based on the court's most recent experience with Dr. Elliott as a witness, I caution the plaintiff against using him to introduce corporate evidence. (*See* Trial Tr., No. 2:13-cv-22473 [Docket 337], at 153-55 ("[M]edical expert witnesses ought to be giving medical expert opinions. And under Rule 702 and Rule 703, statements by corporate representatives are not statements that a medical expert such as Dr. Elliott would reasonably rely upon in any context other than litigation. This is an important factor in my decision. . . . Accordingly, offering such evidence through this witness, through this doctor substantially increases the **[*29]** risk of confusing and misleading this jury. . . . I am not going to allow Dr. Elliott to further opine based on what corporate representatives said.").

Lastly, Cook argues Dr. Elliott is not qualified to opine on the adequacy of Cook's product testing and that his expert opinions on this subject are unreliable. (Cook's Mem. re: Elliott [Docket 37], at 19). The plaintiff concedes that "Dr. Elliott will not testify that defendant had an obligation to study and failed to do so." (Pl.'s Opp. re: Elliott [Docket 46], at 16). Accordingly, Cook's motion with regard to adequacy of testing is DENIED as moot.

In sum, Cook's motion with regard to Dr. Elliott is **DENIED in part** and **DENIED as moot in part**.

IV. Plaintiff's *Daubert* Motions

A. Motion to Exclude General Liability/Causation Testimony of Anthony Atala, M.D.

Dr. Anthony Atala is a practicing urologist and a professor in urology at the Wake Forest University School of Medicine. Over the past ten years, Dr. Atala has performed pelvic surgeries using SIS products manufactured by Cook. Based primarily on his personal experience with these products, along with a peer-reviewed study that he co-authored, Dr. Atala proffers that he "do[es] not see any capacity" of Cook's SIS products "to cause the injuries of which the plaintiffs generally complain." (Atala Report [Docket 24-1], at 5). The **[*31]** plaintiff raises two objections to this general causation opinion. First, she asserts that the court should exclude Dr. Atala's testimony because his expert report does not comply with the disclosure requirements set forth in *Federal Rule of Civil Procedure 26*. Second, she argues that Dr. Atala's opinion lacks supporting authority or methodology, and so it is inadmissible under *Daubert*. I address each objection in turn.

1. Federal Rule of Civil Procedure 26

In relevant part, *Rule 26* provides as follows:

> *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; and (v) a statement of the compensation **[*32]** to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B). If a report is incomplete or incorrect in some material respect, the party must supplement its report with the additional or corrective information. *Fed. R. Civ. P. 26(e)*. Any supplemental information must be disclosed at least thirty days before trial. *Id.* (requiring additions or changes to expert disclosures to be disclosed "by the time the party's pretrial disclosures under *Rule 26(a)(3)* are due"). Dr. Atala provided the plaintiff with an expert report on November 16, 2014, and he supplemented his report with a sworn affidavit on February 18, 2015. (*See* Cook's Ex. 1 ("Atala Aff.") [Docket 42-1]). Trial is scheduled for April 20, 2015. Therefore, the supplemental affidavit is timely, and I consider it along with the initial expert report in determining the adequacy of the expert disclosure.[8]

The plaintiff argues that Dr. Atala's expert disclosure falls short of the *Rule 26* requirements in that it "does not offer any reasoning or cite any remotely relevant supporting authority in support of his general causation opinions." (Pl.'s **[*33]** Mot. to Exclude General Liability/Causation Test. of Anthony Atala, M.D. ("Pl.'s Mot. re: Atala") [Docket 24], at 3-4). I disagree and find that Dr. Atala's expert disclosure adequately states his opinion and the authority supporting it for the purposes of *Rule 26*. He explains that he reviewed deposition testimony (Atala Report [Docket 24-1] at 2), his SIS patients' records from the past ten years (*Id.* at 5), a peer-reviewed study in which he participated on the long-term postoperative surgical complications of SIS implantation surgery (*id.* at 4-5), and medical literature on the use of biologic graft materials including Cook's SIS products (Atala Aff. [Docket 42-1], at 4). Dr. Atala also provided his *curriculum vitae*, which includes his educational background, professional appointments, honors and

[8] I refer to Dr. Atala's initial expert report [Docket 24-1] and his supplemental affidavit [Docket 42-1] collectively as his "expert disclosure."

awards, teaching experiences, and publications for the past twenty-five years. (*Id.*). This is enough to satisfy *Rule 26*, a discovery requirement simply meant to ensure that the opposing party has a "reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." *Fed. R. Civ. P. 26* advisory committee notes; *see also Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 642 (7th Cir. 2008)* ("The purpose of *Rule 26(a)(2)* is to provide notice to opposing counsel [] as to what the expert witness will testify . . . . ").[9] But **[*34]** whether or not the supporting authority cited by Dr. Atala in his expert disclosure is enough to satisfy the reliability requirements of *Federal Rule of Evidence 702*—that it is relevant, scientifically valid, and supportive of the expert's opinions—is another matter. Thus, finding no *Rule 26* error in Dr. Atala's expert disclosure, I now apply *Daubert*'s analysis to his opinions.

2. Reliability of Methodology

The plaintiff contends that the court should exclude Dr. Atala's opinions because they are conclusory statements with no supporting authority or scientific methodology. Consequently, in the plaintiff's view, Dr. Atala's report is comprised of improper *ipse dixit*, or "opinions justified solely by the fact that a qualified expert holds them." (Pl.'s Mot. re: Atala [Docket 24], at 4-5). Dr. Atala offers several bases for his opinion that SIS lacks the capacity to cause the injuries of **[*35]** which the plaintiff complains, and, contrary to the plaintiff's position, I find that these sources, taken together, create a reliable basis for his testimony.

Dr. Atala primarily refers to his experience as a urologist. He explains that over the past ten years, he has used SIS graft material manufactured by Cook in pelvic surgeries, and "[n]one of [his] patients showed any evidence of graft infection, erosion, chronic inflammation, allergic reactions, pain, or genitourinary problems." (Atala Report [Docket 24-1], at 5). In his supplementary affidavit, Dr. Atala elaborates that his practice involves "follow[ing] up" with his patients after their surgeries for a period of six months or more and advising them to "contact [him] if they experienced any problems, symptoms, or matters they felt were related to the surgery." (Atala Aff. [Docket 42-1], at 2). None of his patients reported any graft complications during follow-up visits or otherwise, which led him to his conclusion that the SIS grafts do not cause injury. (*Id.*). The plaintiff claims that clinical experience alone cannot serve as a basis for an expert opinion.

The advisory committee notes to *Federal Rule of Evidence 702* offer some insight into this issue, explaining that "[i]n certain fields, experience is the predominant, if not sole, **[*36]** basis for a great deal of reliable expert testimony." *Fed. R. Evid. 702* advisory committee notes. Indeed, as the Supreme Court has observed, "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 156, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. When an expert relies "solely or primarily on experience," however, the court cannot simply "tak[e] the expert's word for it." *Fed. R. Evid. 702* advisory committee notes. Rather, the *Daubert* inquiry becomes whether the expert can "explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id.*; *see also Kumho Tire Co., 526 U.S. at 151* ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable."). Thus, the plaintiff is correct that the court cannot deem an opinion reliable on the grounds that the expert has experience, unless the expert has established a link between his observations and his conclusions.

Dr. Atala's report, however, offers more than a bald appeal to his **[*37]** experience. In addition to examining his ten years' of practice with Cook's SIS material, Dr. Atala also relied on a peer-reviewed study in which he participated to reach his conclusions in this case. (*See* Atala Report [Docket 24-1], at 4-5 (referring to Raya-Rivera et al., *Tissue-engineered autologous vaginal organs in patients: a pilot cohort study*, 384 Lancet 329 (2014))). In this study, the authors used SIS material in vaginal reconstruction surgeries and followed the patients over an eight-year period. The authors found "no long-term postoperative surgical complications." Raya-Rivera et al. at 329. According to Dr. Atala, the study's results reflect what he has observed in his own patients—SIS products have the ability "to remodel in the pelvic/vaginal area of the human body" and that patients "d[o] not suffer from any long-term adverse effects from the SIS product like or similar to those claimed by the plaintiff in the Cook cases." (Atala Aff. [Docket 42-1], at 3).[10] Dr. Atala's

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[9] Though the plaintiff does not point this out, I notice that Dr. Atala has not provided "a statement of compensation" for his testimony in this case as required by *Rule 26(a)(2)(B)*. I find this omission a harmless error, but, in the interest of conformance with *Rule 26*, I ORDER Cook to provide compensation information to the plaintiff within seven days of the entry of this Memorandum Opinion and Order.

thorough comparison of his experience to a reliable and relevant peer-reviewed study—published in one of the world's leading medical journals—is enough to open *Daubert*'s gates. *See, e.g.,* Tyree v. Boston Scientific Corp., F. Supp. 3d , 2014 U.S. Dist. LEXIS 148312, [WL] *72 (S.D. W. Va. 2014), as amended (Oct. 29, 2014), *available at* 2014 WL 5320566 (finding that Dr. Green's clinical experience and review of the **[*38]** scientific literature, which he explained and cited throughout his expert report, "are sufficiently reliable bases in forming this particular opinion").[11]

The plaintiff has some questions that are left unanswered by Dr. Atala's expert report. But these questions, which concern the particulars of Dr. Atala's analysis and opinions, are better suited for deposition or cross-examination. As the Fourth Circuit explained, "[a]ll *Daubert* demands is that the trial **[*39]** judge make a 'preliminary assessment' of whether the proffered testimony is both reliable (i.e. based on 'scientific knowledge') and helpful (i.e. of assistance to the trier of fact in understanding or determining a fact in issue)." Md. Case. Co. v. Therm-O-Disc, Inc., 137 F.3d 780, 783 (4th Cir. 1998). Here, I find Dr. Atala's testimony, which arises from scientific knowledge gleaned from his experience as a urologist and his work on the Raya-Rivera et al. study, as reliable and helpful to the jury's determination of causation. Therefore, I DENY the plaintiff's Motion to Exclude General Liability/Causation Testimony of Anthony Atala, M.D. [Docket 24].

B. Motion to Exclude General Liability/Causation Testimony of Mickey Karram, M.D.

Dr. Mickey Karram, a practicing urologist and professor of obstetrics and gynecology at the University of Cincinnati School of Medicine, opines that his experience and the "documented feature" of SIS material "is in direct contradiction to the alleged complaints that the material [] is incompatible or not safe." (Karram Report re: Dunnington [Docket 25-1], at 2; Karram Report re: Gann [Docket 25-2], at 2). The plaintiff moves to exclude Dr. Karram's opinions on the basis that the sole general-causation paragraph in his reports does not comply with the disclosure requirements of Federal Rule of Civil Procedure 26, nor does it demonstrate reliability **[*40]** as required by *Daubert*.

To begin, I note that the bulk of Dr. Karram's reports focus on specific causation for two women who are not parties to this case. (Karram Report re: Dunnington [Docket 25-1] (opining on specific causation for Ms. Sara Dunnington); Karram Report re: Gann [Docket 25-2] (opining on specific causation for Ms. Carol Gann)). These opinions are irrelevant to the present matter and thus EXCLUDED. *See* Daubert, 509 U.S. at 591 ("Expert testimony which does not relate to any issue in the case is not relevant and ergo, non-helpful." (internal quotations omitted)). Accordingly, the remainder of my discussion focuses on the single general-causation paragraph in Dr. Karram's reports, (*see* Karram Report re: Dunnington [Docket 25-1], at 3; Karram Report re: Gann [Docket 25-2], at 2), along with the supplemental affidavit provided by Cook in response to the plaintiff's motion, (*see* Cook's Ex. 1 ("Karram Aff.") [Docket 39-1]).

1. Federal Rule of Civil Procedure 26

In relevant part, Rule 26 provides as follows:

> *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly **[*41]** involve giving expert testimony. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or

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[10] That this study was performed on women with vaginal aplasia (the absence of a normal vagina at the time of birth) does not make it irrelevant, as the plaintiff suggests, because the conclusion of the study—that the use of biomaterial in vaginal reconstruction "remains functional in a clinical setting long term"—is universal. Raya-Rivera et al. at 336. The selection of women with vaginal aplasia was merely for the purpose of uniformity across subjects. *See id.* at 335.

[11] Dr. Atala also connects his opinions with the research of others. (*See* Atala Aff. [Docket 42-1], at 4 (listing six other articles that "are consistent with and supported by" the Raya-Rivera et al. study)). For the reasons explained below with respect to Dr. Karram, I do not consider this literature in my analysis of his expert opinions. *See infra* at 28.

support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; and (v) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B). If a report is incomplete or incorrect in some material respect, the party must supplement its report with the additional or corrective information. Fed. R. Civ. P. 26(e). Any supplemental information must be disclosed at least thirty days before trial. *Id.* (requiring additions or changes to expert disclosures to be disclosed "by the time the party's pretrial disclosures under Rule 26(a)(3) are due"). Here, in addition to his expert reports regarding Ms. Dunnington and Ms. Gann, Dr. Karram provided a supplemental sworn affidavit regarding his opinions on February 17, 2015. (*See* Karram Aff. [Docket 39-1]). Trial is scheduled for June 8, 2015. Therefore, the supplemental affidavit is timely, and I consider it along with the initial expert **[*42]** report in determining the adequacy of the expert disclosure.[12]

The plaintiff argues that Dr. Karram's expert disclosure falls short of the Rule 26 requirements in that it "offers no supporting authority." (Pl.'s Mot. to Exclude General Liability/Causation Test. of Mickey Karram, M.D. ("Pl.'s Mot. re: Karram") [Docket 25], at 4). Although Dr. Karram's expert disclosure is cursory, I find that it adequately states his opinion and the authority supporting it for the purposes of Rule 26. He explains that his opinion was informed by his observations of and experience with SIS patients over the past five years (Karram Aff. [Docket 39-1], at 2-3), in addition to "well documented" literature (*id.* at 3-4). Dr. Karram also provided his *curriculum vitae*, which includes his educational background, medical experience, honors and awards, leadership positions, professorships, and publications for the past thirty years. (*Id.*). This is enough to satisfy Rule 26, a discovery requirement simply meant to ensure that the opposing party has a "reasonable opportunity to prepare for effective cross examination and perhaps **[*43]** arrange for expert testimony from other witnesses." Fed. R. Civ. P. 26 advisory committee notes; *see also* Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 642 (7th Cir. 2008) ("The purpose of Rule 26(a)(2) is to provide notice to opposing counsel [] as to what the expert witness will testify . . . . "). But whether or not the supporting authority cited by Dr. Karram in his expert disclosure is enough to satisfy the reliability requirements of Federal Rule of Evidence 702—that it is relevant, scientifically valid, and supportive of the expert's opinions—is another matter. Thus, finding no Rule 26 error in Dr. Karram's expert disclosure, I now apply Daubert's analysis to his opinions.

2. Reliability of Methodology

The plaintiff contends that the court should exclude Dr. Karram's opinions because they are conclusory statements with no identifiable supporting authority or scientific methodology. Consequently, in the plaintiff's view, Dr. Karram's expert disclosure is comprised of improper *ipse dixit*, or "opinions justified solely by the fact that a qualified expert holds them." (Pl.'s Mot. re: Karram [Docket 25], at 4-5). The limited information set forth in Dr. Karram's expert disclosure, though sufficient to get by the plaintiff's Rule 26 challenge, is not complete enough to make a reliability decision under *Daubert* at this time.

Dr. Karram primarily refers to his **[*44]** experience as a urologist in reaching his opinion. He states that during the last five years of his practice, he has used SIS in multiple pelvic floor surgeries, and his experience is "in direct contradiction" to the complaints raised against Cook. (Karram Aff. [Docket 39-1], at 3). While experience can be "the predominant, if not sole, basis for a great deal of reliable expert testimony," the court must ensure that the expert can "explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee notes. Generally, under this analysis, a doctor who has extensive experience with a medical device may offer opinions on the use of that device. But when the opinion crosses into causation, like Dr. Karram's, an unscientific sample of the expert's patients is not an adequate foundation to suggest reliability under *Daubert*, and the court needs further explanation from the expert on how his experience leads to a causation opinion in order to make a reliability determination.

Dr. Atala, for instance, provided the needed explanation by referring to and elaborating on his co-authored peer-reviewed study, **[*45]** which mirrored his observations as a pelvic surgeon and established a reliable basis for his opinion on medical causation. Only equipped with Dr. Karram's abbreviated Rule 26 expert disclosure, the court cannot tell if Dr. Karram has a similar basis for his causation opinions. Dr. Karram points to "well documented" literature and provides a list of nine "consistent" articles in his affidavit. (Karram Aff. [Docket 39-1], at 2-4). Unlike Dr. Atala, however, he does not convey how he relied on these articles

[12] I refer to Dr. Karram's initial expert reports [Dockets 25-1 & 25-2] and his supplemental affidavit [Docket 39-1] collectively as his "expert disclosure."

in reaching his opinions. Indeed, beyond listing them in his affidavit, he does not mention these articles in his expert disclosure at all. It is possible that he thoroughly read the authors' work and used their results to come to his opinion in this case. But the court has no way reach an informed conclusion.[13] Put simply, without a more developed record, such as sworn testimony via deposition or interrogatories, the court cannot make an informed decision about the reliability of Dr. Karram's general causation opinions.

Therefore, the court RESERVES judgment on the plaintiff's motion with respect to Dr. Karram [Docket 25]. A short hearing (outside the presence of the jury) will be held on this matter at a convenient time during trial.

C. Motion to Exclude General Liability/Causation Testimony of Dennis Metzger, Ph.D.

The plaintiff seeks to exclude the general causation opinions of Dennis Metzger, Ph.D. Dr. Metzger is an immunologist who opines that there is no scientific evidence that SIS could cause graft-hose-disease ("GVHD"), hypersensitivity reactions, chronic or acute infections, or deleterious immune reactions. (Metzger Report [Docket 26-1], at 3). In forming his opinions, Dr. Metzger relies primarily on two studies he conducted specific to the use of SIS for tissue repair. I will refer to the first study as the "mouse study" and the second study as the "human study." In both studies, Dr. Metzger **[*47]** "found that SIS did indeed induce immune responses . . . but these responses were restricted to the so-called Th2 immune pathway, which is known to be consistent with tissue acceptance." (Metzger Report [Docket 26-1], at 1). The results of the mouse study were published in a peer-reviewed journal in 2001, and the results of the human study were published in a peer-reviewed journal in 2007. (*Id.* at 2). The plaintiff contends that Dr. Metzger's opinions are both irrelevant and unreliable. (Pl.'s Daubert Mot. to Exclude General Liability/Causation Test. of Dennis Metzger, Ph.D. ("Pl.'s Mot. re: Metzger") [Docket 26], at 2). More specifically, the plaintiff argues that the animal studies upon which Dr. Metzger relies cannot be "extrapolated to the plaintiff." (*Id.* at 4).

To begin, the plaintiff appears to confuse the issues of relevance and reliability, arguing "Dr. Metzger's opinions are neither relevant nor reliable because, quite simply, his analysis is too far removed from the issues in this case." (Pl.'s Mot. re: Metzger [Docket 26], at 3). Whether Dr. Metzger's analysis is "too far removed" relates to relevance, not reliability. *See Daubert, 509 U.S. at 591-92* ("Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful."). In contrast, with regard to **[*48]** reliability, the court will focus on Dr. Metzger's "principles and methodology." *Id. at 594-95*.

1. Relevance

First, the plaintiff contends that Dr. Metzger's opinions are irrelevant because his "studies were not designed to (and did not) demonstrate whether there is an inflammatory reaction to SIS." (Pl.'s Mot. re: Metzger [Docket 26], at 3). In reviewing the materials in this case, I note that "immune response" and "inflammatory response" have been used somewhat interchangeably. (*See* Metzger Dep. [Docket 54-2], at 66-67 (Q: [H]ow do you distinguish an immunological response from an inflammatory response? A: I don't. I don't necessarily distinguish those two terms."); *see also* Aff. of Dennis W. Metzger, Ph.D. [Docket 44-1], at 1 ("As indicated in my report, I have personally studied Cook porcine small intestinal submucosa ("SIS") and whether it elicits any immune or inflammatory response in both animal models and human, and, if so, the nature of any such responses.")). Regardless, Dr. Metzger's concise description of the mouse study adequately demonstrates its relevance: "So the question we had was, again: Was there an immune response to SIS in mice, and ultimately in humans? And was it the type of immune response which would be thought to lead to rejection of a foreign material such as SIS?" (Metzger Dep. [Docket 54-2], at 77-78). The plaintiff alleges that SIS **[*49]** is "biologically reactive with human tissue and promotes an immune response[,]" which "promotes infection and rejection of the biological mesh, as well as damage to the surrounding pelvic tissue." (Master Compl., MDL 2440 ¶ 24). Therefore, Dr. Metzger's examination of whether mice had an immune response to SIS, which resulted in rejection, fits squarely within the plaintiff's allegations. Accordingly, the plaintiff's motion with regard to relevance is DENIED.

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[13] This determination is particularly difficult to make, given that Dr. Karram clearly copied and pasted the list of articles from Dr. Atala's affidavit. This is evident by Dr. Karram's statement that his opinions **[*46]** "are consistent with and supported by *our* study as discussed above." (Karram Aff. [Docket 39-1], at 4 (emphasis added)). Nowhere in his expert disclosure does Dr. Karram discuss a study in which he participated. Rather, this language came from Dr. Atala's expert disclosure, wherein he refers to the Raya-Rivera et al. study in which he participated as "our study." (Atala Aff. [Docket 42-1], at 5).

2. Reliability

Next, the plaintiff contends that Dr. Metzger's opinions are unreliable because they are based solely on animal studies, which cannot be extrapolated to humans. In response, Cook argues in support of the validity of animal studies, but also explains that Dr. Metzger's opinions are based on "his overall scientific experience during thirty years of professional research, teaching and participation in professional organizations." (Cook's Resp. in Opp. to Pl.'s Daubert Mot. to Exclude the General Liability/Causation Test. of Dennis Metzger, Ph.D. [Docket 44], at 7). Additionally, Cook filed an affidavit from Dr. Metzger further explaining the different studies he has participated in,[14] as well as listing the scientific literature not originally cited in his expert report that he relied upon in forming his opinions. (*See generally* Aff. of Dennis W. Metzger, **[*50]** Ph.D. [Docket 44-1]).[15]

Properly designed and conducted animal testing can yield relevant and useful information. *See Bourne ex rel. Bourne v. E.I. DuPont de Nemours & Co., 189 F. Supp. 2d 484, 496 (S.D. W. Va. 2002)*. However, "experts relying on animal studies 'must be prepared to explain how such studies can be reliably extrapolated to prove comparable effects in humans.'" *Hines v. Wyeth, No. 2:04-0690, 2011 U.S. Dist. LEXIS 74038, 2011 WL 2680814, at *6 (S.D. W. Va. July 8, 2011)* (quoting *In re Prempro, 738 F. Supp. 2d 887, 894 (E.D. Ark. 2010)*; *see also Decker, 770 F.3d at 392* (affirming district court's finding that expert opinions based on animal studies, when combined with other scientific evidence, pass muster under *Daubert*). Had Dr. Metzger's opinions been based solely on the mouse study or if he failed to **[*51]** explain how and why the study can be extrapolated to humans, I would tend to question the reliability of his methodology. However, Dr. Metzger's deposition testimony and subsequent declaration explain that his opinions are based on both animal *and* human studies, as well as his review of scientific literature and years of experience as an immunologist. In fact, when describing the human study, Dr. Metzger explicitly states that it was conducted to see if he could achieve the same results with humans as he did with mice. (Metzger Dep. [Docket 54-2], at 81 ("We were trying to confirm the mouse studies basically.")). Dr. Metzger "extrapolated" his mouse results by actually performing a comparable study on humans. Taken together, I **FIND** that the different bases for Dr. Metzger's expert opinions satisfy the requirements of *Daubert*. Accordingly, the plaintiff's motion with regard to reliability is **DENIED**.

D. Motion to Exclude the Testimony of Dr. Stephen Park Rhodes

Dr. Stephen Rhodes offers opinion testimony on Cook's "compliance with the FDA regulations and guidance." (Rhodes Report [Docket 27-1], at 2). Specifically, Dr. Rhodes opines that Cook followed the standards and requirements for premarket clearance under *21 U.S.C. § 360* ("510(k) clearance") and ultimately obtained **[*52]** 510(k) clearance from the FDA for each of its SIS products.[16] The plaintiff moves to exclude Dr. Rhodes's opinion on the basis that purported compliance with FDA regulations is not relevant to the plaintiff's state law tort claims. As the plaintiff points out, this court has excluded FDA evidence in every MDL trial to date under *Federal Rules of Evidence 401*, *402*, and *403*. *See, e.g., Cisson v. C. R. Bard, Inc., F. Supp. 3d , 2015 U.S. Dist. LEXIS 6089, [WL] *4 (S.D. W. Va. 2015)*, *available at* 2015 WL 566959 (listing cases). I see no reason to depart from this position here.

Daubert advises courts to keep in mind the other rules of evidence when evaluating expert testimony. *See Daubert, 509 U.S. at 595* ("Throughout, a judge assessing a proffer of expert scientific testimony under *Rule 702* should also be mindful of other applicable rules . . . ."). Accordingly, I first consider whether Dr. Rhodes's opinion on FDA compliance is relevant to the state tort claims in this case under *Rule 401*, which provides that evidence is relevant if "it has a tendency to make a fact more or less probable than it would be without the evidence." *Fed. R. Evid. 401*. Cook contends that its compliance with 510(k) goes to "whether the product is defective, whether the defective condition is unreasonably dangerous, and whether the defendant met the applicable **[*53]** standard

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[14] From 1996 to 2000, Dr. Metzger participated in three SIS symposiums in Florida where he presented his research. (Aff. Of Dennis W. Metzger, Ph.D. [Docket 44-1], at 1-2). Additionally, he acted as principal investigator for two SIS studies funded by Cook. He presented his Cook research at a scientific conference in Montreal, Quebec, Canada in 2004, and spoke at a symposium in New Mexico in 2005. (*Id.* at 4).

[15] As discussed more fully *supra* related to Dr. Atala, any supplemental information must be disclosed at least thirty days before trial. *Fed. R. Civ. P. 26(e)*. Dr. Metzger's affidavit [Docket 44-1] was filed on February 19, 2015, and is timely. Therefore, I consider it along with his original expert report.

[16] For a discussion on the 510(k) clearance process, see *Lewis v. Johnson & Johnson, 991 F. Supp. 2d 748, 751-52 (S.D. W. Va. 2014)*.

of care." (Resp. in Opp. to Pl.'s Mot. to Exclude the Test. of Dr. Stephen Park Rhodes ("Cook's Opp. re: Rhodes") [Docket 43], at 2). Cook points to the Restatement (Third) of Torts in support of its position, which provides that "a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective[.]" *Restatement (Third) of Torts: Products Liability § 4* (1998). Given the Supreme Court precedent on the meaning and purpose of 510(k) clearance, however, Cook's argument must fail.

The Supreme Court has held that compliance with 510(k) focuses on "equivalence, not safety," and that products entering the market through the 510(k) process have "never been formally reviewed [for] safety and efficacy." *Medtronic, Inc. v. Lohr, 518 U.S. 470, 478-79, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)*; *Riegel v. Medtronic, Inc., 552 U.S. 312, 322, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008)* (explaining that the 510(k) process is an "exemption from federal safety review"). If 510(k) does not go to a product's independent safety and efficacy—the "very subjects" of the plaintiff's products liability claims, *id. at 323*—then evidence of Cook's compliance with 510(k) has minimal relevance in this case and should be excluded by the court. *See Fed. R. Evid. 402* ("Irrelevant evidence is not admissible."). The Restatement provision, which focuses on *safety* statutes, **[*54]** is thus inapplicable, *see Restatement (Third) of Torts: Products Liability § 4 cmt. a* (explaining that the phrase "safety statute or administrative regulation" is meant to encompass regulations "that establish binding safety standards for the design and marketing of products"), and Dr. Rhodes's opinion, which focuses entirely on 510(k) compliance, has no relevance in this case.[17]

Assuming 510(k) clearance satisfied the relevance standard of *Rule 401*, I nevertheless find that the balancing test set forth in *Rule 403* forecloses the admission of FDA evidence and, consequently, Dr. Rhodes's opinion. *Rule 403* permits exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Fed. R. Evid. 403*. Here, expert opinions on the requirements of the Federal Drug and Cosmetic Act ("FDCA")—which are not at issue in the case—and Cook's compliance with § 510(k) of the FDCA—which says nothing about the independent safety of **[*56]** the product—could lead to more confusion about the state tort claims than enlightenment. As I explained in *Lewis v. Johnson & Johnson*:

> [a]dmission of any evidence regarding the 510(k) process runs the risk of misleading the jury to believe that FDA 510(k) clearance might be dispositive of the plaintiffs' state law claims. The prejudicial value of evidence regarding the 510(k) process far outweighs its probative value. . . . Jurors are likely to believe that FDA enforcement relates to the validity of the plaintiffs' state law tort claims, which it does not. [Furthermore,] the jury may attach undue significance to an FDA determination and [] alleged shortcomings in FDA procedures are not probative to a state law products liability claim.

991 F. Supp. 2d 748, 754-55 (S.D. W. Va. 2014). Allowing such evidence to come in through the gloss of an expert opinion increases the *Rule 403* concern because "[e]xpert evidence can be both powerful and quite misleading." *Daubert, 509 U.S. at 595* (internal quotation marks omitted). Introducing 510(k) evidence could also provoke the parties to engage in a time-consuming mini-trial on whether Cook in fact complied with its provisions. Excluding Dr. Rhodes's opinion testimony, as well as other FDA evidence, avoids these risks.

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[17] The cases that Cook lists in its response, wherein the court considered FDA compliance, are also not determinative here. Most of them concern the defectiveness of prescription drugs, which are governed by regulations that concern *safety*, thereby distinguishing them from the case at bar. *See, e.g., Fulgenzi v. PLIVA, Inc., 711 F.3d 578, 589 (6th Cir. 2013)* (considering a prescription drug and concluding that "[u]nless federal law bears on the state duty of care, evidence of such law is inadmissible"); *Tobin v. Astra Pharm Prods., Inc., 993 F.2d 528, 538 (6th Cir. 1993)* (holding, prior to *Lohr*, that FDA approval of a new drug, which requires consideration of the drug's safety, can be considered by the jury in reaching its verdict on design defect) (emphasis added); *Rader v. Teva Parental Meds. Inc., 795 F. Supp. 2d 1143, 1149 (D. Nev. 2011)* ("This court agrees . . . that compliance with product *safety* regulations is relevant and admissible on the question of defectiveness." (internal quotations omitted)) (emphasis added); *Torkie-Tork v. Wyeth, 739 F. Supp. 2d 895, 900 (E.D. Va. 2010)* (concluding that FDA approval of a drug, which requires **[*55]** consideration of the drug's safety, can be relevant to the negligent design claim); *Erickson v. Baxter Healthcare, Inc., 151 F. Supp. 2d 952, 958-59 (N.D. Ill. 2001)* (concerning intravenous blood transfusions); *Brasher v. Sandoz Pharms. Corp., No. cv-98-TMP-2648-S, 2001 U.S. Dist. LEXIS 18364, 2001 WL 36403362, at *1 (N.D. Ala. Sept. 21, 2001)* (concerning a prescription drug called Parlodel, which was marketed through the FDA's premarket approval process); *Martinkovic v. Wyeth Labs., Inc., 669 F. Supp. 212, 217 (N.D. Ill. 1987)* (considering a vaccine, which is governed by the National Vaccine Program, *42 U.S.C. § 300aa-22*); *Foyle v. Lederle Labs., 674 F. Supp. 530, 533 (E.D.N.C. 1987)* (same). The only case that focuses on a medical device was decided by a district court years prior to *Lohr*, *Hegna v. E.I. du Pont de Nemours & Co., 806 F. Supp. 822 (D. Minn. 1992)*, and consequently, it does not carry much weight in my analysis.

Cook's attempts to get **[*57]** around the court's previous holdings on this matter are not persuasive. First, Cook attempts to diminish the controlling law set forth in *Lohr* by pointing to an internal evaluation from the FDA, which expresses the view that that modifications to the 510(k) program over time have formed it into a "multifaceted premarket review process" that "provide[s] reasonable assurance of safety and effectiveness." (Cook's Opp. re: Rhodes [Docket 43], at 7 (quoting Ctr. For Device & Radiological Health, *510(k) Working Group Preliminary Report and Recommendations* 34 (2010))). Given the Supreme Court's clear analysis in *Lohr*, I decline to give this internal evaluation any deference. The FDA cautions that the internal reports are "preliminary" and do not reflect any "decisions on specific changes to pursue." Jeffrey Shuren, Director, Ctr. for Devices & Radiological Health, *Foreword: A Message from the Center Director* 5 (2010). Thus, while cognizant of these recommendations, I must defer to the current Code of Federal Regulations and Supreme Court precedent, both of which consistently maintain that 510(k) clearance does not focus on product safety. *See Lohr, 518 U.S. at 493 (1996)* ("[T]he 510(k) process is focused on equivalence, not safety."); *21 C.F.R. § 807.97 (2012)* (providing that 510(k) clearance **[*58]** "does not in any way denote official approval of the device" and "[a]ny representation that creates an impression of official approval of a device because of complying with the premarket notification regulations is misleading and constitutes misbranding").[18]

In its next attempt to convince the court of the relevancy of Dr. Rhodes's FDA opinion, Cook contends that Dr. Rhodes's testimony "is relevant on the issue of federal preemption," and it spends the rest of its brief arguing that the court should "entitle" Cook's SIS products to federal preemption. (Cook's Opp. re: Rhodes [Docket 43], at 4). An argument in favor of preemption does not belong in the context of *Daubert*. Indeed, whether federal law preempts a state claim is a question of law for **[*60]** the court to decide and not for an expert to comment on. *See Nat'l Home Equity Mortg. Ass'n v. Face, 64 F. Supp. 2d 584, 591 (E.D. Va. 1999), aff'd, 239 F.3d 633 (4th Cir. 2001)* ("The Supreme Court has expressly stated that federal preemption of contrary state laws presents pure questions of law . . . ." (citing *United Steelworkers of Am. v. Rawson, 495 U.S. 362, 365, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990)*)). Accordingly, Dr. Rhodes's testimony is not relevant to the determination of whether 510(k) clearance preempts any state law claims.

In sum, even if Dr. Rhodes's opinions on 510(k) compliance met the relevance requirements set forth in *Rule 401*, the substantial risk of misleading the jury and wasting judicial resources by diving into a morass of FDA regulations—none of which relate to the state law claims at issue—weighs heavily in favor of exclusion. For these reasons, Dr. Rhodes's opinion is **EXCLUDED** in its entirety, and the plaintiff's Motion to Exclude the Testimony of Dr. Stephen Park Rhodes [Docket 27] is **GRANTED**.

E. Motion to Exclude Expert Testimony of Improperly Designated Employees

The plaintiff seeks to exclude the expert testimony of the following Cook employees because they were improperly designated under *Federal Rule of Civil Procedure 26*: (1) Michael C. Hiles, Ph.D.; (2) Umesh Patel, Ph.D.; (3) Jason Hodde, M.S.; (4) Christopher Fecteau, M.S.E., M.P.H.; (5) Chad Johnson, Ph.D.; (6) Neal Fernot, Ph.D.; and **[*61]** (7) Perry W. Guinn. The plaintiff argues that Cook's designation of these corporate experts was invalid because it disclosed only the names of the employees and their job titles. The plaintiff contends these corporate experts should have submitted expert reports, or, at the very least, that Cook was "required to identify the subject matter, opinions, and facts supporting the witnesses' testimony." (Pl.'s Mot. to Exclude Expert Test. of Improperly Designated Employees [Docket 28], at 2-3). I agree with the latter.

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[18] Furthermore, the most recent FDA commentary on 510(k) clearance, published after the internal evaluation, indicates concurrence with these authoritative sources. *See generally* FDA, *The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications [510(k)]: Guidance for Industry and Food and Drug Administration Staff* ("Guidance Document") (July 28, 2014), *available at* http://www.fda.gov/downloads/medicaldevices/deviceregulationandguidance/guidancedocuments/ucm284443.htm (last visited Mar. 19, 2015). Crucially, the Guidance Document distinguishes between the vigorous analysis of product safety conducted under the premarket approval process and the more lax "evidentiary standard" applied in the 510(k) review process. *Id.* at 7. For premarket approval, the medical device must independently demonstrate safety and effectiveness. *Id.* at 6. In contrast, for 510(k) review, the FDA considers safety and effectiveness comparatively, "generally rel[ying], in part, on FDA's prior determination **[*59]** that a reasonable assurance of safety and effectiveness exists for the predicate device." *Id.* at 7. The analysis is predominantly relative, and the FDA does not engage in an independent investigation of the medical device's safety and effectiveness. *Id.* ("FDA generally evaluates differences between the new device and the predicate device to determine their effect on safety and effectiveness."). The language of the Guidance Document therefore confirms this court's conclusion that compliance with 510(k) has little to no relevance in a matter of state tort law that revolves around the objective safety of a product. Likewise, Cook's appeal to the Safe Medical Device Act of 1990, which was enacted years before the Guidance Document, is unpersuasive.

Under Rule 26(a)(2), an expert witness is required to provide a written report when he or she is "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). Cook's corporate witnesses have not been specially retained to testify in this case and none of them regularly give expert testimony as part of their employment duties. (*See* Cook's Mem. of Law in Opp. to Pl.'s Mot. to Exclude Expert Test. of Cook Employees [Docket 38], at 3). Consistent with the plain language of the rule, as well as the court's treatment of similar witnesses throughout the course of these MDLs, I FIND that Cook's corporate witnesses are not required to submit expert reports.

However, disclosures for non-retained corporate experts must state (1) the subject matter on which the witness is expected to present **[*62]** evidence; and (2) a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C). Cook included neither of these in the designation for its corporate experts, giving the plaintiff no indication as to what these witnesses intend to testify about at trial.

Under Rule 37(c), "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). This court has broad discretion in deciding whether a Rule 26(a) violation is substantially justified or harmless. Michelone v. Desmarais, 25 Fed. App'x 155, 158 (4th Cir. 2002). While the majority of Cook's response argues why it was not required to submit expert reports, Cook offers no justification, substantial or otherwise, for its failure to provide any information on the subject matter of these employees' testimony. Accordingly, the question, then, is whether Cook's failure is harmless in that it does not prejudice the plaintiff.

Cook points out that the plaintiff has already taken the depositions of four of the seven corporate experts. Therefore, at this stage in the litigation, the plaintiff has been made **[*63]** aware of the subject matter of those four employees' testimony, weighing against the possibility of prejudice. However, the plaintiff still has practically no information on the three remaining corporate witnesses. Employing my broad discretion, I **DENY** the plaintiff's motion with regard to improperly designated employees and **ORDER** Cook to provide updated disclosures for its corporate experts within **seven days** that state (1) the subject matter on which the witness is expected to present evidence; and (2) a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C).

F. Motion to Exclude the General Liability/Causation Testimony of Robert L. Long, M.D.

Dr. Robert Long, a practicing urologist with thirty-seven years of experience treating female incontinence, offers the general causation opinion that in the patients he has implanted with Cook SIS slings, the product "did not cause them to suffer chronic pelvic or vaginal pain or chronic dyspareunia following the surgeries." (Long Aff. [Docket 50], at 2). In support of this opinion, Dr. Long refers to his twelve years of experience using Cook xenographic slings, his "preferred sling material because of the ease of use, patient tolerance, adaptability **[*64]** of the sling material, and lack of complications." (Long Report [Docket 29-1], at 1). He states that "[t]o date, [he has] not experienced any patients with erosion, extrusion, persistent pelvic pain secondary to the sling placement, dyspareunia secondary to the sling placement, or recurrent urinary tract infection." (*Id.* at 1-2).[19] The plaintiff moves to exclude Dr. Long's opinion on the basis that his expert disclosures do not comply with the requirements of Federal Rule of Civil Procedure 26, nor do they demonstrate reliability as required by *Daubert*. I address these objections in turn.

1. Federal Rule of Civil Procedure 26

In relevant part, Rule 26 provides as follows:

> *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) **[*65]** the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or

[19] Dr. Long also offers a specific causation opinion with respect to Ms. Hovey, but challenges to this opinion are not before the court at this time.

support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; and (v) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B). If a report is incomplete or incorrect in some material respect, the party must supplement its report with the additional or corrective information. Fed. R. Civ. P. 26(e). Any supplemental information must be disclosed at least thirty days before trial. *Id.* (requiring additions or changes to expert disclosures to be disclosed "by the time the party's pretrial disclosures under Rule 26(a)(3) are due"). Here, in addition to an expert report regarding Ms. Hovey, (*see* Long Report [Docket 29-1]), on February 23, 2015, Dr. Long provided a supplemental sworn affidavit regarding his opinions, (*see* Long Aff. [Docket 50]). Trial is scheduled for June 8, 2015. Therefore, the supplemental affidavit is timely, and I consider it along with the initial expert report in determining the adequacy of the expert disclosure.[20]

The plaintiff argues that Dr. Long's expert disclosure falls short of the Rule 26 requirements in that it "offers no supporting authority." (Pl.'s Mot. to Exclude General Liability/Causation Test. of Robert L. Long, M.D. ("Pl.'s Mot. re: Long") [Docket 29], at 4). Although Dr. Long's expert disclosure is cursory, I find that it adequately states his opinion and the authority supporting it for the purposes of Rule 26. He explains that his opinion was informed by his observations of and experience with SIS patients over the past twelve years, as well as his review of Ms. Hovey's medical records. (Long Report [Docket 29-1], at 1-2). Dr. Long also provided his *curriculum vitae*, which includes his educational background, medical experience, fellowships, memberships, and publications. (Cook's Ex. 3 [Docket 40-3]). Finally, he provided a list of supporting scientific literature. (Long Aff. [Docket 50], 2-3). This is enough to satisfy Rule 26, a discovery requirement simply meant to ensure that the opposing party has a "reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." Fed. R. Civ. P. 26 advisory committee notes; *see also* Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 642 (7th Cir. 2008) ("The purpose of **[*67]** Rule 26(a)(2) is to provide notice to opposing counsel [] as to what the expert witness will testify . . . ."). But whether or not the supporting authority cited by Dr. Long in his expert disclosure is enough to satisfy the reliability requirements of Federal Rule of Evidence 702—that it is relevant, scientifically valid, and supportive of the expert's opinions—is another matter. Thus, finding no Rule 26 error in Dr. Long's expert disclosure, I now apply Daubert's analysis to his opinions.

2. Reliability of Methodology

The plaintiff contends that the court should exclude Dr. Long's opinions because they are conclusory statements with no identifiable supporting authority or scientific methodology. Consequently, in the plaintiff's view, Dr. Long's expert disclosure is comprised of improper *ipse dixit*, or "opinions justified solely by the fact that a qualified expert holds them." (Pl.'s Mot. re: Long [Docket 29], at 4). The limited information set forth in Dr. Long's expert disclosure, though sufficient to get by the plaintiff's Rule 26 challenge, is not complete enough to make a reliability decision under *Daubert* at this time.

Dr. Long primarily refers to his experience as a urologist in reaching his opinion. He states that during the last twelve years of his practice, Cook SIS **[*68]** slings "have been [his] preferred sling material," (Long Report [Docket 29-1], at 1), and that in his experience, Cook SIS slings do not cause patients to suffer injury following the surgery, (Long Aff. [Docket 50], at 2). While experience can be "the predominant, if not sole, basis for a great deal of reliable expert testimony," the court must ensure that the expert can "explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee notes. Generally, under this analysis, a doctor who has extensive experience with a medical device may offer opinions on the use of that device. But when the opinion crosses into causation, like Dr. Long's, an unscientific sample of the expert's patients is not an adequate foundation to suggest reliability under Daubert, and the court needs further explanation from the expert on how his experience leads to a causation opinion in order to make a reliability determination.

Dr. Atala, for instance, provided the needed explanation by referring to and elaborating on his co-authored peer-reviewed study, which mirrored his observations as a pelvic surgeon and established a reliable basis **[*69]** for his opinion on medical causation. Only equipped with Dr. Long's abbreviated Rule 26 expert disclosure, the court cannot tell if Dr. Long has a similar basis for his causation opinions. Dr. Long lists ten articles that "are consistent with" his opinion, (Long Aff. [Docket 50], at 3-4), but unlike Dr. Atala, he does not convey how he relied on these articles in reaching his opinion. Indeed, beyond listing them in his affidavit, he

[20] I refer to Dr. Long's initial expert report [Dockets 29-1] and his supplemental affidavit [Docket **[*66]** 50] collectively as his "expert disclosure."

does not mention these articles in his expert disclosure at all. It is possible that he thoroughly read the authors' work and used their results to come to his opinion in this case. But the court has no way to make an informed conclusion. Put simply, without a more developed record, such as sworn testimony via deposition or interrogatories, the court cannot make an informed decision about the reliability of Dr. Long's general causation opinions.[21]

Therefore, the court **RESERVES** judgment on the plaintiff's motion with respect to Dr. Long [Docket 29]. A short hearing (outside the presence of the jury) will be held on this matter at a convenient time during trial.

V. Effect of *Daubert* Ruling

I emphasize that my rulings excluding expert opinions under *Rule 702* and *Daubert* are dispositive of their admissibility in these cases, but my rulings not to exclude expert opinions are not dispositive of their admissibility. In other words, to the extent that certain opinions might be cumulative or might confuse or mislead the jury, they may still be excluded under *Rule 403* or some other evidentiary rule. I will take up these issues **[*71]** as they arise.

VI. Conclusion

To reiterate: Defendants' Motion to Exclude the Opinions and Testimony of Donald Kreutzer, Ph.D. [Docket 30] is **DENIED**; defendants' Motion to Exclude the Opinions and Testimony of Lisa Morici, Ph.D. [Docket 32] is **GRANTED in part and DENIED in part**; defendants' Motion to Exclude the Opinions and Testimony of Daniel S. Elliott, M.D. [Docket 36] is **DENIED**; plaintiff's Motion to Exclude General Liability/Causation Testimony of Anthony Atala, M.D. [Docket 24] is **DENIED**; plaintiff's Motion to Exclude General Liability/Causation Testimony of Dennis Metzger, Ph.D. [Docket 26] is DENIED; plaintiff's Motion to Exclude the Testimony of Dr. Stephen Park Rhodes [Docket 27] is **GRANTED**; and plaintiff's Motion to Exclude Expert Testimony of Improperly Designated Employees [Docket 28] is **DENIED**. It is further **ORDERED** that Cook provide the plaintiff with expert compensation information for Dr. Atala and updated disclosures for its corporate experts within seven days of the entry of this Memorandum Opinion and Order. Finally, the court **RESERVES** judgment on plaintiff's Motion to Exclude General Liability/Causation Testimony of Mickey Karram, M.D. [Docket 25] and plaintiff's **[*72]** Motion to Exclude General Liability/Causation Testimony of Robert L. Long, M.D. [Docket 29].

The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: March 26, 2015

/s/ Joseph R. Goodwin

JOSEPH R. GOODWIN

UNITED STATES DISTRICT JUDGE

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[21] In a footnote, the plaintiff also challenges the relevance of Dr. Long's opinion that the product's side-effect of recurring incontinence occurs at the rate disclosed by the literature and that the SIS product is better than other mesh products. (*See* Pl.'s Mot. re: Long [Docket 29], at 6 n.3). I find that because the plaintiff claims recurrence as one of her injuries, testimony regarding **[*70]** the rate of that side-effect is relevant. I further find that a comparison of Cook's product to other mesh products might be relevant to the risk-utility analysis applied to design-defect claims under Texas law. *See Timpte Indus. v. Gish, 286 S.W.3d 306, 311-12 (Tex. 2009)* ("To determine whether a product was defectively designed so as to render it unreasonably dangerous, Texas courts have long applied a risk-utility analysis . . . .") (citing *Am. Tobacco Co. v. Grinnel, 951 S.W.2d 420, 432 (Tex. 1997)*). Thus, I decline to exclude these opinions on the basis of relevance at this time.

EXHIBIT I

Neutral
As of: February 6, 2025 2:10 PM Z

Shirt v. Hazeltine

United States District Court for the District of South Dakota, Central Division

May 23, 2003, Decided; May 23, 2003, Filed

CIV. 01-3032-KES

Reporter
2003 U.S. Dist. LEXIS 29762 *

ALFRED BONE SHIRT; BELVA BLACK LANCE; BONNIE HIGH BULL; and GERMAINE MOVES CAMP, Plaintiffs, vs. JOYCE HAZELTINE, in her official capacity as Secretary of the State of South Dakota; SCOTT ECCARIUS, in his official capacity as Speaker of the South Dakota House of Representatives; SOUTH DAKOTA HOUSE OF REPRESENTATIVES; ARNOLD BROWN, in his official capacity as President of the South Dakota Senate; and SOUTH DAKOTA SENATE, Defendants.

Prior History: *Bone Shirt v. Hazeltine, 2002 DSD 9, 200 F. Supp. 2d 1150, 2002 U.S. Dist. LEXIS 8553 (D.S.D., May 2, 2002)*

Core Terms

trust land, redistricting, totality of the circumstances, plaintiffs', dilution, extraordinary circumstances, motivates

Counsel: **[*1]** For Alfred Bone Shirt, Belva Black Lance, Bonni High Bull, Germaine Moves Camp, Plaintiffs: Bryan L. Sells, LEAD ATTORNEY, Law Office of Bryan L. Sells, LLC, Atlanta, GA; M. Laughlin McDonald, LEAD ATTORNEY, ACLU (Atlanta, GA), Atlanta, GA; Neil Bradley, LEAD ATTORNEY, PRO HAC VICE, Avondale, GA; Patrick K. Duffy, LEAD ATTORNEY, Patrick K. Duffy, LLC, Rapid City, SD.

For Joyce Hazeltine, in her official capacity as Secretary of State of the State of South Dakota, Scott Eccarius, in his official capacity as Speaker of the South Dakota House of Representatives, House of Representatives, South Dakota, Arnold Brown, in his official capacity as President of the South Dakota Senate, Senate, South Dakota, Defendants: John P. Guhin, Sherri Sundem Wald, LEAD ATTORNEYS, Attorney General of South Dakota, Pierre, SD; Timothy M. Engel, LEAD ATTORNEY, May, Adam, Gerdes & Thompson, Pierre, SD.

Clerk, USCOA, Interested Party, Pro se, St. Paul, MN.

For United States of America, Amicus: Cheryl Schrempp DuPris, LEAD ATTORNEY, U.S. Attorney's Office (Pierre, SD), Pierre, SD; Gaye L. Tenoso, R. Tamar Hagler, LEAD ATTORNEYS, Department of Justice, Washington, DC.

Judges: KAREN E. SCHREIER, UNITED STATES DISTRICT JUDGE. **[*2]**

Opinion by: KAREN E. SCHREIER

Opinion

ORDER

Plaintiffs move to exclude testimony of current members of the South Dakota legislature and their staffs relating to the motive or purpose for passing the redistricting plan in 2001. Plaintiffs further move to exclude or limit testimony of state officials regarding state expenditures and the status of trust lands in Shannon and Todd counties. Defendants oppose the motions.

BACKGROUND

Plaintiffs challenge the validity of South Dakota's 2001 redistricting plan under *Section 2* of the Voting Rights Act, *42 U.S.C. § 1973*. Plaintiffs allege that the plan dilutes the strength of the Native American voting power. Defendants deny these allegations. In their response to plaintiffs' first set of interrogatories, defendants indicate they intend to call current South Dakota legislators to testify to "information relevant to the passage of the South Dakota 2001 Redistricting Plan." Plaintiffs move in limine to exclude such testimony as impermissible evidence of legislative purpose. Plaintiffs claim the testimony is misleading and that no extraordinary circumstances justify such testimony. Defendants argue that the legislators should be allowed to testify on their own behalf on any relevant subject. While **[*3]** it may not be the best evidence for proving legislative purpose, it is not inadmissible.

Plaintiffs also move to exclude state officials' testimony relating to the amount of state and local benefits Native Americans receive in Todd and Shannon counties. Plaintiffs argue that this evidence is irrelevant because intent is not at issue. They further claim that this testimony is under inclusive because many tribal members do not live in these two counties and over inclusive because it does not separate benefits received by members from those received by nonmembers. Finally, plaintiffs assert that it is impossible to determine the proportionality of benefits received and that there is only evidence of state and federal benefits rather than state and local. Plaintiffs also move to exclude testimony that Native Americans voluntarily chose to live on trust land.

Defendants argue that testimony on both issues is relevant to the legislature's responsiveness to the members of Shannon and Todd counties. Because the court must look at the totality of the circumstances, such testimony is necessary to determine whether the redistricting plan violates Section 2. Additionally, defendants point to the complaint **[*4]** which details discrimination against Native Americans in housing and employment in Shannon and Todd counties. Because plaintiffs raised this issue, defendants argue that evidence of the amount of benefits received and the voluntary decision to live on trust land is relevant.

DISCUSSION

1. Evidence of the Legislature's Intent

Section 2 of the Voting Rights Act of 1965 "bars all states and their political subdivisions from maintaining any voting 'standard, practice, or procedure' that 'results in a denial or abridgement of the right . . . to vote on account of race or color.' *Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 479, 117 S. Ct. 1491, 1491, 137 L. Ed. 2d 730 (1997)*; *42 U.S.C. § 1973(a)*. A voting procedure violates *Section 2* through impermissible dilution

> if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation [by members of a class defined by race or color] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b). To prove voting dilution, a plaintiff must establish that (1) a racial group that is sufficiently large and geographically compact to constitute a majority **[*5]** in a single-member district; (2) the group is politically cohesive; and (3) the white majority typically votes as a bloc, which allows it to defeat the minority's preferred candidate. *Bossier Parish, 117 S. Ct. at 1498*. The totality of the circumstances must demonstrate the dilutive effect of the voting scheme. Id.

"***Congress*** . . . ***clearly expressed its desire*** that § 2 *not* have an intent component." *Id. at 1499*. Thus, testimony of current legislators' intent when passing the redistricting plan is irrelevant. Only relevant evidence is admissible, and to be relevant, evidence must have the tendency to make the existence of a fact that is of consequence more or less likely. *Fed. R. Evid. 401-402*. Because intent is not a fact that is of consequence in this case, evidence of such intent is inadmissible.

Even if evidence of intent is relevant, courts should allow testimony by legislators relating to their intent only in extraordinary circumstances. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268, 97 S. Ct. 555, 565, 50 L. Ed. 2d 450 (1977)*. Proving the actual motivation of a large body of legislators is difficult and can often be misleading. *Hunter v. Underwood, 471 U.S. 222, 105 S. Ct. 1916, 1920, 85 L. Ed. 2d 222 (1985)*. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." Id. Indeed, neither **[*6]** a single nor primary factor may have motivated the legislative body to enact certain legislation. *Arlington Heights, 97 S. Ct. at 563*. Because such testimony intrudes into the workings of the legislative branch, courts should avoid placing a decision maker on the stand. *Arlington Heights, 97 S. Ct. at 565 n.18*. Only in extraordinary circumstances will direct inquiry of the legislators be

allowed. *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 91 S. Ct. 814, 825-26, 28 L. Ed. 2d 136 (1971)*. Here, defendants have made no showing of extraordinary circumstances.

Accordingly, Defendants cannot call South Dakota legislators to testify on the issue of their intent when passing the redistricting plan. In addition to being irrelevant to a Section 2 claim, defendants have not demonstrated any extraordinary circumstances which justify such testimony. While the legislators may testify on their own behalf about matters relevant to whether or not the redistricting plan violates Section 2 of the Voting Rights Act, testimony of their intent is excluded.

2. Evidence of Responsiveness

In addition to the three preconditions necessary for establishing a successful Section 2 claim, plaintiffs must demonstrate that the totality of the circumstances evidences dilution. *Thornburg v. Gingles, 478 U.S. 30, 44-45, 106 S. Ct. 2752, 2763, 92 L. Ed. 2d 25 (1986)*; *Johnson v. De Grandy, 512 U.S. 997, 1011, 114 S. Ct. 2647, 2657, 129 L. Ed. 2d 775 (1994)*. The Senate enumerated factors to consider when examining whether a practice results in impermissible dilution.[1] Id. A party need **[*7]** not satisfy a certain number of factors or prove that a majority of them point a certain way. Id. Other factors in addition to the Senate's enumerated list may also be relevant and taken into consideration by the court. *Gingles, 106 S. Ct. at 2763*.

The Senate Report noted that evidence demonstrating elected officials' unresponsiveness to the particularized needs of the members of the minority group may have probative value. Id. Evidence of responsiveness, therefore, is also relevant. *NAACP v. City of Niagara Falls, New York, 65 F.3d 1002, 1023 (2d Cir. 1995)*. This factor deserves less weight because of its subjective nature that requires a court to decipher which policy steps respond to the needs of the minority community. *Id. at 1023 n.24*. "Unresponsiveness is not an essential part of plaintiff's case. Therefore, defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process." *Clark v. Calhoun County, Miss., 88 F.3d 1393, 1400 (5th Cir. 1996)* (quoting S. Rep. 417 at 29 n.116). Thus, this factor has limited relevance. *Westwego Citizens for Better Government v. City of Westwego, 946 F.2d 1109, 1122 (5th Cir. 1991)*.

In City of Niagara Falls, the court considered evidence of the city's responsiveness to the minority group. *65 F.3d at 1023*. This evidence included the establishment of an affirmative action task force, the receipt **[*8]** of grants to increase community policing in black neighborhoods, school integration programs, a Fair Housing Law, and a fund to provide loans to black business owners. Id. This evidence indicated responsiveness by the city. Id. See *Clark, 88 F.3d at 1400* (evidence that county had recently repaved roads in predominately black neighborhood and formed a biracial commission was admitted to prove responsiveness).

In the case at hand, testimony relating to the amount of state and local benefits Native Americans in Todd and Shannon counties receive is relevant on the issue of defendants' responsiveness. The evidence is probative of how the state and counties have addressed the needs of the Native American community. The level of defendants' responsiveness is a question of kind and degree, which the fact finder will weigh at trial. *Clark, 88 F.3d at 1401*. See *NAACP v. Fordice, 252 F.3d 361, 372 (5th Cir. 2001)* (court considered plaintiffs' evidence of unresponsiveness but ultimately concluded it did not support the Section 2 complaint). Plaintiffs' objections go to the weight of the evidence rather than its admissibility and plaintiffs can raise these objections through cross examination. See *Westwego, 946 F.2d at 1123* (where degree of responsiveness was disputed, court did not err in concluding that plaintiffs did not **[*9]** adequately demonstrate a lack of responsiveness); *Harvell v. Blytheville School District No. 5, 71 F.3d 1382, 1390-91 (8th Cir. 1995)* (evidence of responsiveness proper even though court ultimately held the evidence insufficiently countered other factors that supported a Section 2 violation).

3. Status of Trust Land

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[1] These factors include the history of voting-related discrimination in the state or political subdivision; the extent to which voting is racially polarized; the extent to which the state has used practices that enhance the opportunity for discrimination against the minority group; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinders their ability to participate in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. *Gingles, 106 S. Ct. at 2763*.

Likewise, defendants can present evidence relating to whether Native Americans voluntarily assumed the economic difficulties of living on trust land. Such evidence is part of the totality of circumstances on which a Section 2 violation is based. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [Native American] and white voters to elect their preferred representatives." *Gingles, 106 S. Ct. at 2764*. Indeed, the Senate included the historic effects of discrimination as a valid consideration. See *id at 2763*.

Evidence indicating whether the social and historical conditions of Native Americans in Todd and Shannon counties result from historical discrimination or from voluntary decisions is relevant and admissible. It helps prove the social and historical conditions leading up to the present suit. It is probative of socioeconomic disparity between whites and Native Americans and is **[*10]** therefore relevant and admissible. See *Clark, 88 F.3d at 1399* (court considered evidence of history of discrimination including segregation of schools); *Westwego, 946 F.2d at 1121-22* (court allowed evidence of minority's socioeconomic status and segregated housing as evidence of a history of discrimination).

Plaintiffs' objections to this testimony goes to its weight rather than its admissibility, and plaintiffs can challenge this evidence during cross-examination. Indeed, the fact finder may determine that whether Native Americans voluntarily assumed the hardships of living on trust land is insignificant in the totality of the circumstances. See *Westwego, 946 F.2d at 1121*. Or the court can disregard the history of past discrimination and socioeconomic disparity. *Clark, 88 F.3d at 1399*. Nonetheless, because a Section 2 claim ultimately rests on a "comprehensive, not limited, canvassing of relevant facts," testimony related to whether Native Americans voluntarily assumed the economic hardships of living on trust land is admissible. *Fordice, 252 F.3d at 373-74*.

CONCLUSION

Testimony of legislators on the issue of motive or intent when passing the redistricting plan is irrelevant and inadmissible. Testimony of benefits received by Native Americans and whether Native Americans assumed the economic difficulties of living on **[*11]** trust lands is admissible.

Accordingly, it is hereby

ORDERED that plaintiffs' first motion in limine (Docket 60) is granted.

IT IS FURTHER ORDERED that plaintiffs' second motion in limine (Docket 70) is denied.

Dated May 23, 2003.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE

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EXHIBIT J

Essintial Enter. Sols., LLC v. United States SBA

United States District Court for the Middle District of Pennsylvania

December 30, 2024, Decided; December 30, 2024, Filed

No. 1:22cv1507

Reporter
2024 U.S. Dist. LEXIS 233671 *; 2024 WL 5248242

ESSINTIAL ENTERPRISE SOLUTIONS, LLC, Plaintiff v. THE UNITED STATES SMALL BUSINESS ADMINISTRATION; ISABELLA CASILLAS GUZMAN, in her official capacity as Administrator of the Small Business Administration; JANET YELLEN, in her official capacity as United States Secretary of Treasury; and THE UNITED STATES OF AMERICA, Defendants

Core Terms

independent contractor, forgiveness, payroll, costs, ambiguous, retroactively, unambiguous, expenses, loans, plain language, substantial justification, summary judgment motion, statutory language, summary judgment, employees, indicates, quotation, temporary, marks, final decision, small business, attorney's fees, proceeds, Lender, words, injunctive relief, Reconsideration, calculation, defendants', capricious

Counsel: **[*1]** For Essintial Enterprise Solutions, LLC, Plaintiff: Bret S. Wacker, LEAD ATTORNEY, Clark Hill Plc, Denver, CO; Danny P. Cerrone, Jr., LEAD ATTORNEY, Clark Hill PLC, Pittsburgh, PA; J. Chris White, Clark Hill PLC, Lansing, MI.

For The United States Small Business Administration, Isabella Casillas Guzman, in her official capacity as Administrator of the Small Business Adminstration, Janet Yellen, in her official capacity as United States Secretary of Treasury, The United States of America, Defendants: Michael Butler, United States Attorney's Office, Harrisburg, PA.

Judges: JULIA K. MUNLEY, United States District Judge.

Opinion by: JULIA K. MUNLEY

Opinion

MEMORANDUM

During the nationwide economic crisis brought on by the coronavirus pandemic, Congress issued a mandate to the Defendant United States Small Business Administration ("SBA") under the ***CARES Act***[1] to make hundreds of billions of dollars in Paycheck Protection Program ("PPP") loans available to American small businesses. See *15 U.S.C. § 636(a)(36)*; (Doc. 34, Defs.' Stmt. Mat. Fact ¶ 1).[2] Loans granted under the PPP may be forgiven if their proceeds were used for certain purposes. *15 U.S.C. § 9005(b)*. Plaintiff Essintial Enterprise Solutions, Inc. received a PPP loan and then sought forgiveness. Although **[*2]** the SBA did forgive part of the loan, it denied the request for total forgiveness. Plaintiff filed the instant complaint seeking review of the SBA's decision to deny complete forgiveness. Before the court for disposition are cross-motions for summary judgment. The parties have briefed their respective positions, and the matter is ripe for adjudication.

Background

Plaintiff Essintial applied to receive a PPP loan in the amount of $7,028,000.00 from Berkshire Bank ("the Lender"). (Doc. 26, Pl.'s SOF at ¶ 1). The Lender approved the Loan application on April 10, 2020, and at the time, the SBA made no objection. (Id. ¶ 3). The Lender funded the Loan in the amount applied for on April 20, 2020. (Id. ¶ 4). Plaintiff alleges that it used the proceeds of the Loan to protect the continued employment of its employees. (Id. ¶ 5).

On January 6, 2021, plaintiff applied for full forgiveness of the Loan. (Id. ¶ 6). The Lender approved the forgiveness application for full forgiveness of the Loan, and in turn, submitted it to the SBA for approval on January 18, 2021. (Id. ¶ 7). In its Final Decision on the application for forgiveness, the SBA found the plaintiff ineligible for full forgiveness of the **[*3]** Loan and that only $3,469,174.00 of the Loan would be forgiven. (Id. ¶ 8). The basis for the lower amount of

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[1] The ***Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020)***.

[2] The court will cite to portions of the Statements of Material Fact which the parties appear to agree upon.

forgiveness was that the original Loan included compensation to independent contractors which the SBA concluded could not be substantiated as an eligible payroll cost. (Id. ¶ 9). Plaintiff appealed the SBA's final decision through the United States SBA Office of Hearings and Appeals ("OHA"). During this appeal, the SBA increased the amount of forgiveness by $233,837.60, thus bringing the total amount of forgiveness to $3,703,011.60 and an unforgiven amount of $3,325,788,40. (Id. 11).

Ultimately, the OHA denied plaintiff's appeal of the SBA's final decision and affirmed the SBA's final decision. (Doc. 3-2, Compl. Exh. 4, Decision of Clifford Sturek, Administrative Judge). Plaintiff filed a Petition for Reconsideration with the OHA. (Doc. 3-3, Compl. Exh. 5). The OHA denied the Petition for Reconsideration. (Doc. 3-4, Compl. Exh. 6). Thirty days after the plaintiff's receipt of the Reconsideration Decision, it became the final decision of the SBA which entitled plaintiff to file the instant action in this court for review of the SBA's decision. See *13 C.F.R. § 134.1211(c)* and *(g)*. The plaintiff's complaint **[*4]** contains the following counts:

Count I — Claim for Declaratory and Injunctive Relief on the basis that the defendants acted without authority in defining payroll costs in a manner inconsistent with the ***CARES Act***;

Count II — Claim for Declaratory Relief regarding the retroactive application of the SBA's Interim Final Rule;

Count III — Application for Temporary Restraining Order and Temporary or Permanent Injunction; and

Count IV — Claim for Attorney's Fees under the *Equal Access to Justice Act*.

At the case management conference, the court set deadlines for the disclosure of the final administrative record and objections thereto and for the filing of motions for summary judgment by each party. (Doc. 22, Case Management Order). In due course both parties moved for summary judgment and briefed their respective positions. Since the briefing of the summary judgment motions, the plaintiff has filed three notices of supplemental authority (Docs. 38, 41, and 42), bringing the case to its present posture.[3]

Jurisdiction

This court has federal question jurisdiction pursuant *28 U.S.C. § 1331* because this case arises under the Constitution, laws, or treaties of the United States, namely the ***CARES Act*** and the *Administrative Procedures Act, 5 U.S.C. §§ 551 et seq.*

Standard of [*5] Review

Granting summary judgment is proper "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" See *Knabe v. Boury Corp., 114 F.3d 407, 410 n.4 (3d Cir. 1997)* (quoting *Fed. R. Civ. P. 56(c)*). "[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (emphasis in original).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co., 898 F.2d 946, 949 (3d Cir. 1990)*. The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. *Anderson, 477 U.S. at 248*. A fact is material when it might affect the outcome of the suit under the governing law. Id. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient **[*6]** to carry the non-movant's burden of proof at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id. at 324*.

At issue with the instant summary judgment motions is a decision from the SBA, a federal agency. The Administrative Procedure Act ("APA") provides for judicial review of federal agency actions. *5 U.S.C. § 702*. It also sets forth the extent of judicial authority to review such agency action. The APA provides that a reviewing court shall:

> hold unlawful and set aside agency action, findings, and conclusions found to be —
>
> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> **(B)** contrary to constitutional right, power, privilege, or immunity;
>
> **(C)** in excess of statutory jurisdiction, authority, or

[3] The Honorable Jennifer P. Wilson transferred this case to the undersigned on November 7, 2023.

limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to *sections 556* and *557* of this title or otherwise reviewed on the record of an agency hearing provided by statute; **[*7]** or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2). In reviewing a federal agency's decision, such as an SBA decision, the court cannot substitute its own policy judgment for that of the agency, but the court must ensure that "the agency . . . acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." See *F.C.C. v. Prometheus Radio Project, 592 U.S. 414, 423, 141 S. Ct. 1150, 209 L. Ed. 2d 287 (2021)*.

Discussion

The instant matter involves a PPP loan. "The PPP is a . . . loan program administered under *Section 7(a) of the Small Business Act* (codified at *15 U.S.C. § 636(a)*). Its purpose [was] to assist small businesses during the COVID-19 crisis by immediately extending them loans on favorable terms." *Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 458 F. Supp. 3d 1044, 1050 (E.D. Wis. 2020)*. The law provides for forgiveness of such loans for small business borrowers who used most of the loan proceeds for "payroll and certain other expenses like mortgage [interest] or rent payments and utility expenses." *15 U.S.C. §§ 636m(a)(1)* and *636m(b)*. The law requires the SBA to reimburse the private lender for any PPP loan determined to be eligible for forgiveness. *15 U.S.C. § 636m(c)(3)*. Forgiveness applies to the portions of loans used for "payroll costs" as that term is defined in the ***CARES Act***. The principal issue in this case is whether **[*8]** plaintiff properly calculated its payroll costs in applying for the Loan and whether full forgiveness should have been provided.

Less than a week after Congress passed the ***CARES Act***, the SBA, with the Department of the Treasury, issued the First PPP Interim Final Rule ("IFR"). The SBA posted the rule on the Department of the Treasury website on April 2, 2020. This First PPP IFR's purpose was to administer the ***CARES Act*** by setting forth borrower eligibility and application requirements for PPP loans. See generally *85 Fed. Reg. 20811 et seq.* This rule provides that payroll costs do not include payments to independent contractors. Id.

As noted above, plaintiff's complaint is comprised of four separate counts. Count I contends that the SBA's denial of full forgiveness of the Loan was arbitrary, capricious, and contrary to law. Count II avers that the SBA applied the IFR retroactively to the Loan. Such retroactive application of the IFR is contrary to the law according to the plaintiff. Count III seeks a temporary restraining order and a temporary or permanent injunction. Finally, Count IV seeks attorney's fees. For an orderly disposition of the issues found in the motions for summary judgment the court will address **[*9]** Count II first and then Counts I, III, and IV in turn.

A. Count II — Retroactive Application of the IFR

Count II of plaintiff's complaint alleges that the SBA committed legal error by applying the IFR to plaintiff's loan retroactively. (Doc. 1, Compl. ¶¶ 79-86). The SBA set the effective date of the IFR as April 15, 2020. *Vol. 85 Fed. Reg., No. 73 at 20811*. The IFR itself indicates that it has "no preemptive or retroactive effect." *Id. at 20817*. Plaintiff applied for its loan on April 4, 2020, and received approval for the loan on April 10, 2020, prior to the effective date of the IFR. (Doc. 26, Pl.'s SOF at ¶¶ 1, 3).

If the SBA did retroactively apply the IFR, then several issues are presented. If the court finds that the SBA applied the IFR retroactively and that such application is lawful, then the court must determine whether the SBA acted within its statutory authority in enacting the IFR. That is, the court would have to determine whether the IFR is valid. If the court concludes that the SBA did not apply the IFR retroactively to the Loan, then a statutory analysis must be made to determine if the SBA's interpretation of the ***CARES Act*** is appropriate. Thus, the issues are either the validity of the IFR or the validity of the **[*10]** SBA's interpretation of the ***CARES Act*** without reference to the IFR.

First, the court will address whether the SBA retroactively applied its rules to plaintiff's Loan. As noted, plaintiff applied for forgiveness of the Loan, and upon initial review, the SBA denied full forgiveness on the basis that plaintiff included independent contractors in its payroll costs. (Doc. 2, at ECF 21). The denial does not mention the IFR. (Id.) Plaintiff then appealed to the OHA. It appears that during plaintiff's OHA appeal, the SBA argued that the IFR applied to plaintiff's Loan. As such, the SBA took the position that plaintiff could not include payments to independent contractors as part of its forgivable payroll costs. The OHA decision does not clearly state that the IFR applies to the Loan. Rather, the decision indicates that the IFR clarified the SBA's position as to how independent contractors would be treated in determining countable payroll costs. (Doc. 3-2, OHA Decision at ECF 17-18). Thus, pre-IFR and post-IFR, the SBA's position was that

independent contractor expenses could not be included as forgivable payroll costs. In other words, the SBA did not need to rely on the IFR to deny full forgiveness **[*11]** because its position pre-IFR was that payments to independent contractors were not included in payroll costs. Plaintiff filed a motion for reconsideration of the OHA's initial decision. The OHA denied the motion for reconsideration. (Doc. 3-4). This decision, like the initial OHA, does not explicitly apply the IFR retroactively to the Loan.

Defendants' initial brief does not appear to directly address the retroactivity argument plaintiff has raised. In its reply brief, however, defendants indicates that the IFR had no impermissible retroactive effect because the rule simply explained pre-existing law, that is, it explained the definition of "payroll costs" set forth in the ***CARES Act***. And in any event, the SBA's reliance on the IFR at most constituted harmless error because the IFR interpretation of the term "payroll costs" under the ***CARES Act*** was the correct one.

The court's review of the record indicates that the SBA did not retroactively apply the IFR to plaintiff's application for loan forgiveness.[4] It merely applied its interpretation of the ***CARES Act***, which, even prior to the effective date of the IFR, meant that independent contractor payments could not be included in payroll costs. **[*12]** As the SBA did not apply the IFR, the court need not determine whether the SBA properly employed its authority in adopting the IFR. Rather, the court's role is to review the ***CARES Act*** and determine whether the SBA's position — prior to the enactment of the IFR - is a valid construction of the ***CARES Act*** with regard to payments to independent contractors.[5]

B. Count I — Declaratory Judgment and Injunctive Relief

Count I of plaintiff's complaint is a claim for declaratory judgment and injunctive relief under *5 U.S.C. § 706(2)(A), (C)*. (Doc. 1, ¶¶ 60-78). This count asserts that the defendants acted without authority when it defined payroll costs in a manner inconsistent with the definition set forth in the ***CARES Act***.[6]

The parties' summary judgment motions call upon the court to construe the ***CARES Act***. Such a statutory analysis proceeds in several steps. See e.g., *B&G Constr. Co. v. Dir., OWCP, 662 F.3d 233, 248-49 (3d Cir. 2011)*. First, the court examines the plain language of the statute. *Id. at 248*. If the language is unambiguous the court rarely needs to inquire into the meaning of the statute beyond examining its wording. Id.

Second, further inquiry may be needed "where the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters, **[*13]** or where the result would be so bizarre that Congress could not have intended it." Id. (internal quotation marks and citation omitted). "It is inappropriate, however, to reference other statutory provisions in order to create an ambiguity where none would otherwise exist." *In re Phila. Newspapers, LLC, 418 B.R. 548, 560 (E.D. Pa. 1989)* (citing *Dir., Off. of Workers' Comp. Programs v. Sun Ship, Inc., 150 F.3d 288, 292 (3d Cir.1998)* (finding that related statutory sections could not be used to create an ambiguity where the language was clear)).

1. Plain Language of the Statute

As noted, the first step in a statutory analysis is to examine the plain language of the statute. The United States Supreme Court has explained that when construing statutes, "courts must give effect to the clear meaning of the statutes as written[,] . . . giving each word its ordinary, contemporary, common meaning." *Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 414, 137 S. Ct. 1002, 197 L. Ed. 2d 354 (2017)* (internal citations and quotation marks omitted). When a court interprets a statute its goal is to effectuate Congress's intent. *S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 257 (3d Cir. 2013)*. To ascertain whether Congress had an intention on the precise question at issue, the court employs the "traditional tools of statutory construction." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 n.9 (1984)*.[7]

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[4] If the IFR had been retroactively applied, the SBA would have committed error. Retroactive rulemaking by an agency is presumptively unauthorized. *Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988)*. Moreover, as stated above, the IFR itself indicates that it is not retroactive. *Vol. 85 Fed. Reg., No. 73 at 20817*.

[5] Although it may appear that the court is explaining a difference without a distinction, it is important to distinguish whether the court needs to rule upon the propriety of the IFR or whether it needs to construe the ***CARES Act*** separate from the IFR. The standards the court would apply is different for each.

[6] Plaintiff discusses the remedy it seeks and the substantive legal issues in the same count. The court will here discuss the substance of Count II and the remedy will be discussed below.

[7] The parties' briefs address the standard of review for agency decisions set forth in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. This standard contains two steps. First the court determines whether a statute is silent or ambiguous with regard to a specific issue. If it is silent or ambiguous, then the court proceeds to the second step, which is to provide deference to the agency's interpretation of the statute and the court must determine whether the agency's interpretation is a "permissible construction." *Id. at 866*. After the briefing in this case was completed,

"The preeminent canon of statutory interpretation requires [the court] to presume that the legislature says in a statute what it means and means in a statute what it says **[*14]** there." BedRoc Ltd., LLC v. U.S., 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004) (internal quotation marks and citations omitted). Accordingly, the court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." Id.

The court, thus, determines if the statute is ambiguous or unambiguous. The court's analysis proceeds no further if the language is unambiguous. See id. To determine if the language is unambiguous, the court reads "the statute in its ordinary and natural sense." Da Silva v. AG United States, 948 F.3d 629, 635 (3d Cir. 2020) (quoting In re Phila. Newspapers, 599 F.3d 298, 304 (3d Cir. 2010)).

When a statute's meaning is unambiguous or plain, the court enforces it according to its terms. "The language of a statute is plain when it admits of no more than one meaning and in such a case the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." In re Genesis Health Ventures, Inc., 402 F.3d 416, 421 (3d Cir. 2005).

Therefore, the court will review the language of the ***CARES Act*** and determine if its language unambiguously includes payments to independent contractors as payroll costs with respect to PPP loans.

The language at issue here is found in 15 U.S.C. § 636(a)(36)(A)(viii) which provides as follows:

> (viii) the term "payroll costs" —
> (I) means
>
> (aa) *the sum of payments of any compensation* with respect to *employees* that is a —
>
> (AA) salary, wage, commission, or similar **[*15]** compensation;
> . . .
>
> *and*
>
> (bb) *the sum of payments of any compensation to* or income of a sole proprietor or *independent contractor* that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than $100,000 . . .

15 U.S.C. § 636(a)(36)(A)(viii) (emphasis added).

This definition can be paraphrased as follows: "Payroll costs" means the sum or payments of any compensation with respect to employees and the sum of payments of any compensation to an independent contractor. Upon initial review, it appears that the language is unambiguous.

The statute provides the above definition of the term at issue, "payroll costs". "When a statute includes an explicit definition, [the court] must follow that definition, even if it varies from that term's ordinary meaning." Stenberg v. Carhart, 530 U.S. 914, 942, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000). "Moreover, 'where the statutory language is unambiguous, the court should not consider statutory ***purpose*** or ***legislative*** history,' In re Phila. Newspapers, LLC, 599 F.3d 298, 304 (3d Cir. 2010), because we operate under the 'assumption that the ordinary meaning of that language accurately expresses the ***legislative purpose***.'" S.H. ex rel. Durrell, 729 F.3d at 257 (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985)).

Plaintiff argues the language is clear and unambiguous such that a plain reading of the statute reveals that the definition **[*16]** of "payroll costs" includes payments made to employees and payments to independent contractors. It appears that plaintiff is correct. The language of the statute itself indicates that compensation to employees and compensation to independent contractors are both included in the definition of "payroll costs."

Defendants argue that the language is in fact ambiguous. The defendants' argument would be compelling if the court could find the word "and" is ambiguous as used between sections (aa) and (bb) of the ***CARES Act*** definition of payroll costs. The Third Circuit Court of Appeals has explained that the usual meaning of the word "*and*" "is conjunctive, and unless the context dictates otherwise, the 'and' is presumed to be used in its ordinary sense[.]" Reese Bros, Inc. v. U.S., 447 F.3d 229, 235-36 (3d Cir. 2006). Here, the context does not dictate otherwise. The language is not ambiguous. The sole reason the definition is in doubt is that the IFR, contrary to the plain language of the statute, indicates that payments to independent contractors are not included in "payroll costs." Merely, drafting a regulation which is contrary to the plain language of a statute, and which cannot be applied retroactively, does not render that statute ambiguous.

Defendants do not provide a different **[*17]** meaning for the plain language used in the statute. Rather, their position is that the court should not examine the statutory language in isolation, but rather must review it considering other provisions of the ***CARES Act***, and the statutory scheme as a whole. When read

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however, the United States Supreme Court overruled Chevron with regard to providing deference to the agency's interpretation. Loper Bright Enters. v. Raimondo, U.S. ; 144 S.Ct. 2244, 219 L. Ed. 2d 832 (2024). The case law interpreting the first step of Chevron, however, remains instructive on the manner in which the court should determine whether or not a statute is ambiguous.

in this manner, it is clear, according to the defendants, that the plaintiff's reading of the statute is incorrect. In other words, to determine that the term is ambiguous and does not in fact mean what it says, defendants suggest that the statute be read as a whole, which leads to the second portion of the court's analysis

2. Result of Applying the Plain Language of the Statute

Once the court determines that the words of the statute have a plain clear meaning, the next step is to determine whether "the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters, or where the result would be so bizarre that Congress could not have intended it." *B&G Constr. Co, 662 F.3d at 248*. Circumstances where such outcomes result are rare. Id. If such results do occur, then the statute is ambiguous, and the court proceeds to further statutory construction tools.

Thus, the law provides that statutory words at issue **[*18]** "must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)* (internal quotation marks and citation omitted). Furthermore, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, [t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)* (internal citation and quotation marks omitted). "A court must ... interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)* (citation and internal quotation marks omitted). Indeed, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. U.S, 574 U.S. 528, 537, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015)* (quoting *Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)*).

"[I]f the statutory language appears to be unambiguous, a court must look beyond that plain language where a literal interpretation would lead to an absurd result, or would otherwise produce a result 'demonstrably at odds with the intentions of the drafters.'" *In re Phila. Newspapers, LLC, 418 B.R. 548, 560 (E.D. Pa. 2009)* (quoting *United States v. Ron Pair Enters., 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)*). The Third Circuit has explained: "We do not look **[*19]** past plain meaning unless it produces a result demonstrably at odds with the intentions of its drafters . . . or an outcome so bizarre that Congress could not have intended it." *Mitchell v. Horn, 318 F.3d 523, 535 (3d Cir. 2003)* (internal quotation marks and citations omitted). The court concludes that allowing an employer to include payments to independent contractors is not an outcome so bizarre that Congress could not have intended it. The purpose of the ***CARES Act*** was to provide "fast and direct economic assistance for American workers, families, small businesses, and industries." https://home.treasury.gov/policy-issues/coronavirus/about-the-***cares-act*** (last visited December 30, 2024). The SBA furthered that purpose by quickly approving the Loan, which provided assistance to American workers, specifically plaintiff's employees and independent contractors.[8]

Defendants argue that the context of the statute as a whole indicates that only payments to employees are allowed for forgiveness to plaintiff in this instance. Defendants highlight the fact that the ***CARES Act*** permits small businesses to count the compensation they provide to their employees. *15 U.S.C. § 636(a)(36)(A)(viii)(I)(aa)*. Additionally, *15 U.S.C. § 636(a)(36)(D)(ii)(I)* permits independent contractors to receive their own PPP loans based upon **[*20]** the amount of their income or compensation. According to plaintiff's reading of the statute, an independent contractor who worked for a small business during the statutory period, as well as the small business itself, would be able to count the compensation paid to the independent contractor toward the calculation of their respective PPP loans. In effect, defendants contend that plaintiff's reading of the statute would allow for independent contractors to "double count" or "double dip".

The statutory language, however, does not permit such double dipping. With regard to payroll costs and independent contractors, the ***CARES Act*** "includes the sum of payments of any compensation to *or* income of a sole proprietor or independent contractor." *15 U.S.C. § 636(a)(36)(A)(viii)(I)(bb)*. Under a plain reading of this portion of the statute, only one party, the payee or the payor is eligible for the funds. Thus, an independent contractor or a business which employs the independent contractor would not in practice be permitted to double dip when the borrower's eligibility or forgiveness application is reviewed by the lender or the SBA. Moreover, Congress required applicants to certify that they had not already received PPP loans duplicative **[*21]** of the ones they were seeking. *15 U.S.C. § 636(a)(36)(G)(i)(IV)*. Defendants' concerns of double-dipping are unfounded.

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[8] Plaintiff asserts that although it used payments to independent contractors in its calculation of payroll costs, it actually expended 100% of its PPP Loan proceeds on W-2 employees, and no independent contractor received PPP funds from it. (Doc. 36 at 10). One of the primary purposes of the PPP was "keeping workers paid and employed." *85 Fed. Reg. at 20,184*.

In support of its position that the context of the statute as a whole indicates that the language at issue is ambiguous, defendants also point to various cases where courts examined other portions of a statute or a statutory scheme as a whole to determine statutory language to be ambiguous. None of the cases that defendants cite to, however, address statutes with such clear and unambiguous language from the definitional section of a statute.

For example, the defendants cite to *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010)* where the United States Supreme Court defined the term "administrative" as it appeared in the False Claims Act. *31 U.S.C. §§ 3729-3733*. The term "administrative" "may, in various contexts, bear a range of related meanings[.]" *Id. at 286* (internal quotation marks and citation omitted). Hence, it was ambiguous. Here, the word Congress used is "and", a word which generally has one meaning rather than having a range of related meanings.

Defendants also cite to *United States v. Andrews, 12 F.4th 255, 261 (3d Cir. 2021)*, where the Third Circuit Court of Appeals addressed a compassionate release statute and the term "extraordinary or compelling" and whether specifically non-retroactive sentencing reductions could be read as to be retroactive **[*22]** based on a statute passed nearly forty years earlier. The phrase was not defined in the statute and the court examined the text, dictionary definitions and a policy statement to determine the meaning of "the otherwise amorphous phrase." *Id. at 260*. Here, the general term "Payroll Costs" is indeed defined in the statute.

A third case relied on by the defendants is *National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)*. In this case, the Supreme Court interpreted a section of the Endangered Species Act "against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed as broadly" as the court of appeals did. *Id. at 666*. Here, applying the words as written will not have the same effect.

The defendants also cite to *Melia-Castanon v. Attorney General of the United State of America, 931 F.3d 224, 233-34 (3d Cir. 2019)*. In that case, the language the court needed to apply was on its face ambiguous when two sections of the statute were read in context with each other. *Id. at 234-35*. Such is not the case here. Defendants have not pointed to another section that clearly makes the definition ambiguous.

Defendants attempt to use the rules of statutory construction to create an ambiguity here where none exists. The defendants point to various statutory sections that it claims evidence an intention by Congress that independent **[*23]** contractor payments should not be included in the calculation of payroll costs.[9] The court need not refer to these sections, however, as the statute is not ambiguous and the plain language of the statute controls. The court cannot refer to other statutory provisions to create an ambiguity in a statute where no ambiguity exists otherwise. *Dir., Off. of Workers' Comp. Progs., 150 F.3d at 292*.

Accordingly, based upon the above reasoning, the court finds that the decision of the SBA to deny full forgiveness of the Loan on the ground that plaintiff included the independent contractor expenses in its calculation of payroll costs was an error of law and thus arbitrary and capricious. Plaintiff's motion for summary judgment on this issue will be granted.

C. Count III — Injunctive Relief

Count III of plaintiff's complaint is an application for a temporary restraining order and temporary or permanent injunction. (Doc. 1, ¶¶ 87-102). Plaintiff's request for a temporary restraining order and temporary injunction will be denied because plaintiff never filed a separate motion for such relief.

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[9] Other facets of the ***CARES Act*** which the defendants cite to for this proposition include:

a. Independent contractors are eligible for their own loans under the ***CARES Act***;

b. Based upon the structure of *§ 636(a)(36)(A)(viii)*, when Congress intended "and" to mean "and" it used the word "sum" also;

c. The ***CARES Act*** excludes foreign employees from the "payroll costs" calculation, but did not exclude foreign independent contractors. If independent contractors were meant to be included, foreign independent contractors would have also been excluded; and

d. The manner in which Congress calculated the loans for farmers and ranchers and the different ways in which loans were calculated for farmers and ranchers with employees versus those without employees indicates that "payroll costs" do not include a business's independent contractor costs.

Defendants also point to a number of ***CARES Act*** provisions regarding loan forgiveness which they claim anticipate that forgivable payroll costs will include employee compensation but not independent contractor costs. These include:

a. Reduction for employee layoffs or pay cuts;

b. Documentation and certification requirements; and

c. Conformity between forgiveness amount and certification requirements.

The permanent injunction will be denied because injunctive relief is not appropriate. Rather, the proper course of action is to declare that the defendants committed **[*24]** a legal error in denying full forgiveness on the basis of the inclusion of independent contractor expenses in the "payroll costs" calculation and remand the case to the SBA for further action consistent with this opinion. *Hasan v. United States DOL, 545 F.3d 248, 251-52 (3d Cir. 2008)*; see also *NLRB v. Enter. Ass'n of Steam Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach., 429 U.S. 507, 522, 97 S. Ct. 891, 51 L. Ed. 2d 1 n. 9, (1977)* ("When an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and, after doing so to remand the case to the (agency) so as to afford it the opportunity of examining the evidence and finding the facts as required by law.' ") (quoting *ICC v. Clyde S.S. Co., 181 U.S. 29, 32-33, 21 S.Ct. 512, 45 L.Ed. 729 (1901)*).

D. Count IV — Attorney's fees.

The final count of plaintiff's complaint seeks attorneys' fees under the *Equal Access to Justice Act, ("EAJA") 28 U.S.C. § 2412*. (Doc. 1, ¶¶ 103-105)

The EAJA provides:

> A court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

The government **[*25]** bears the burden to establish first that the agency action giving rise to the litigation was substantially justified, and second, that its litigation positions were substantially justified. *Kiareldeen v. Ashcroft, 273 F.3d 542, 545 (3d Cir. 2001)*. To be substantially justified the government need not be correct, but instead must demonstrate "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory it propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." *Id. at 554* (quoting *Morgan v. Perry, 142 F.3d 670, 684 (3d Cir. 1998)*). The question of substantial justification is entirely distinct from the question of whether the government was correct on the merits. Id. Thus, when analyzing the government's legal positions, "[t]he relevant legal question is 'not what the law now is, but what the Government was substantially justified in believing it to have been.'" Id. (quoting *Pierce v. Underwood, 487 U.S. 552, 561, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)*).

The court finds that the SBA was substantially justified in believing its interpretation of the ***CARES Act*** was proper. Defendants made arguments which, in light of the IFR, were appropriate, although, the court has found that ultimately the defendants were not correct on the merits.

Because the court finds that the SBA's position was substantially **[*26]** justified, the award of attorney's fees under the EAJA will be denied.

Conclusion

For the reasons set forth above, the court will grant the plaintiff's summary judgment in part. The motion will be granted to the extent that the decision of the SBA will be overturned as not in accordance with law and arbitrary and capricious. The law does not support the SBA's conclusion that independent contractor expenses cannot be included in plaintiff's "payroll costs" of the Loan. The court will therefore vacate the final decision and order, and remand the case to the SBA for further proceedings consistent with this opinion. Specifically, the SBA is instructed that denial of forgiveness of the Loan on the basis that it included payment to independent contractors is not proper. The SBA should re-evaluate plaintiff's application for forgiveness and include independent contractor expenses as an appropriate addition to payroll costs. The defendants' motion for summary judgment will be denied. Additionally, plaintiff's request for attorney's fees will be denied. An appropriate order follows.

Date: 12/30/24

/s/ Julia K. Munley

JUDGE JULIA K. MUNLEY

United States District Court

ORDER

AND NOW, to wit, this 30th **[*27]** day of December 2024, the plaintiff's summary judgment (Doc 25) is **GRANTED** in part. The motion is granted to the extent that the decision of the Small Business Administration ("SBA") is overturned as arbitrary and capricious. The law does not support the SBA's conclusion that independent contractor expenses cannot be included in plaintiff's "payroll costs" of the Loan. The final decision and order regarding forgiveness of the plaintiff's PPP loan is **OVERTURNED** and **REMANDED** to the SBA for further proceedings consistent with this opinion. Specifically, the SBA is instructed that denia I of forgiveness of the Loan on the basis that it included payment to independent contractors is

not proper. The SBA should re-evaluate plaintiff's application for forgiveness and include independent contractor expenses as an appropriate addition to payroll costs. The plaintiff's motion is **DENIED** in all other respects. The defendants' motion for summary judgment (Doc. 31) is **DENIED**. The Clerk of Court is directed to close this case.

BY THE COURT:

/s/ Julia K. Munley

JUDGE JULIA K. MUNLEY

United States District Court

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EXHIBIT K

Popal v. State Empl. Sec. Div.

Court of Appeals of Nevada

October 20, 2022, Filed

No. 84291-COA

Reporter
2022 Nev. App. Unpub. LEXIS 468 *; 518 P.3d 879; 2022 WL 12455235

NAVEED POPAL, Appellant, vs. THE STATE OF NEVADA EMPLOYMENT SECURITY DIVISION; AND LYNDA PARVEN, AS ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION, Respondents.

Notice: NOT DESIGNATED FOR PUBLICATION. PLEASE CONSULT THE NEVADA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Core Terms

Driver, unemployed, benefits, pandemic, CARES, self-certification, reasons, stop working, credible, quit, eligibility, self-certified, place of employment, sworn testimony, Unemployment, unemployment benefits, district court, shutdown, agencies, driving

Judges: **[*1]** Gibbons, C.J., Tao, J., Bulla, J.

Opinion

ORDER OF REVERSAL AND REMAND

Naveed Popal appeals from a district court order denying his petition for judicial review. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Popal started driving for Lyft, an app-based ride share company, in 2017.[1] Popal did not own his own car, so he relied on Lyft's partnership with Hertz Rental Car, known as the Express Driver Program, to secure a weekly rental car for work. In September 2019, Popal took a break from driving "due to health and personal issues" but planned to return to driving.

In March 2020, Popal tried to return to work. However, when he arrived to claim his weekly rental car, he discovered that the Express Driver Program had been shut down due to the COVID-19 pandemic. To help cover his lost wages, Popal applied for Pandemic Unemployment Assistance[2] (PUA) through the Nevada Employment Security Division (the Division). Papal's application was approved, and he received PUA benefits throughout the spring and summer of 2020.

Yet, in September 2020, the Division terminated Popal's benefits. The Division did so because it determined he did not meet the requirements of the CARES Act, in **[*2]** that he was not truly out of work due to the pandemic. Rather, the Division found that Popal was unemployed because he had quit his job in September 2019 and his employer purportedly shut down in February 2020.

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[1] We recount the facts only as necessary for our disposition.

[2] *See* *15 U.S.C. § 9021(a)(3)*. PUA is provided under the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). *See* *15 U.S.C. §§ 9001-9021*.

Papal appealed his termination and was given a telephonic hearing with the Division's appeals referee.[3] In his hearing, Popal provided sworn testimony that he had "stopped working" due to his health and for personal reasons, but that he had always planned to return to driving in early 2020. The referee did not ask Popal to explain how either his health or personal reasons justified an extended leave of absence but did ask for evidence that he intended to return to work after his break. However, because the Express Driver Program did not require a driver to give advance notice of his or her intent to rent a car for the week, Popal offered primarily his own testimony. His testimony included that he physically tried to return to work in March 2020 but could not because the Express Driver Program located in Las Vegas was closed due to the pandemic shutdown, such that he was now unemployed only because of the pandemic.

Based on Popal's use of the phrase "stopped working," the referee **[*3]** found in August 2021 that Popal had actually quit his job and was thus unemployed for reasons not related to the pandemic, nor compensable under the CARES Act. Yet, the referee made no findings as to the credibility of Papal's self-certification, his testimony, or the sufficiency of his evidence. Also, the Division did not present any contradicting evidence to Popal's sworn testimony of being solely on a break from work, nor did the referee explore whether the reasons for his break would render the length of it unreasonable. Furthermore, the referee did not find Popal's testimony that the Express Driver Program was his place of business inaccurate, insufficient, or not credible; nor that his testimony was mistaken or incorrect that it was shut down in March 2020 because of the pandemic.

Popal appealed the referee's decision to the Board of Review (the Board), but the Board adopted the referee's findings and reasons, thereby affirming the referee's decision. Popal then petitioned the district court for judicial review. The district court denied the petition, determining that the Board acted within its discretion and had "followed the law" with a citation to the United States Department **[*4]** of Labor's (the DOL) "Question 14" as authority. This appeal followed.

Popal raises the following issues on appeal: first, that the Division, appeals referee, and Board incorrectly interpreted the CARES Act when his PUA benefits were denied; second, that the DOL's guidance under "Question 14" does not control the Division's denial of Popal's PUA benefits. We agree and address each argument in turn.

PUA was a temporary federal unemployment assistance program offered to claimants who were not eligible for traditional unemployment benefits, but who were nevertheless unemployed or underemployed as a result of the COVID-19 pandemic. *See* *15 U.S.C. § 9021*. To effectuate the legislative purpose of the CARES Act, President Biden directed administrative agencies by executive order, long before the referee's decision in this case, to "specifically consider actions that . . . improve access to, reduce unnecessary barriers to, and improve coordination among programs funded . . . by the Federal Government . . . [and] should prioritize actions that provide the greatest relief to individuals." Exec. Order No. 14002, Fed. Reg. 7229 (Jan. 22, 2021), *reprinted in* *15 U.S.C.A. § 9001*, 86.

To qualify for PUA benefits at the time Papal applied, **[*5]** [4] an applicant needed to show three things: (1) ineligibility for standard unemployment benefits, (2) self-certification that he or she was "otherwise able to work and available for work . . . except [that he or she is] unemployed, partially unemployed, or unable or unavailable to work"; and (3) self-certification that the reason for being unable to work was for one of eleven pandemic-related reasons enumerated within the statute. *15 U.S.C. § 9021(a)(3)(A)*. One of the enumerated reasons that allowed for PUA eligibility was if an applicant could self-certify his or her "place of employment [was] closed as a direct result of the COVID-19 public health emergency." *Id.* at *(a)(3)(A)(ii)(I)(jj)*. There is no burden on an applicant found in the statute beyond credible, honest self-certification.

Because individual states' workforce agencies were tasked with administration of the PUA program, the DOL gave periodic updates and guidance through a series of letters directed to the states. In these letters, the DOL answers states' frequently asked questions about how to determine an applicant's PUA eligibility. Relevant here is "Question 14," which is found under the DOL's Unemployment Insurance Program Letter No. 16-20, Change 2:

> Question **[*6]** : If an individual becomes unemployed for reasons unrelated to COVID-19, and now is unable to find work because businesses have closed or are not hiring due to COVID-19, is he or she eligible for PUA?

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[3] Popal was unrepresented by counsel during the hearing.

[4] The CARES Act was amended to add a documentation requirement to receive PUA benefits for those claiming self-employment. This amendment was made after the relevant facts in this case; however, Popal's self-employment is not in dispute. *See* *15 U.S.C. § 9021(a)(3)(A)(iii)*.

> Answer: No. An individual is only eligible for PUA if the individual is otherwise able to work and available to work but is unemployed, partially unemployed, or unable or unavailable for work for a listed COVID-19 related reason under *Section 2102(a)(3)(A)(ii)(I)* of the CARES Act. Not being able to find a job because some businesses have closed and/or may not be hiring due to COVID-19 is not an identified reason.

U.S. Dep't of Labor, *Unemployment Insurance Program Letter No. 16-20, Change 2*, 1-6 (July 21, 2020).

Thus, the DOL has directed states to deny PUA benefits to applicants who quit their jobs for reasons unrelated to the pandemic but who later have difficulty reentering the workforce due to pandemic-related business closures and hiring freezes.

We review the factual findings of an administrative agency for clear error or an abuse of discretion. *Elizondo v. Hood Mach., Inc., 129 Nev. 780, 784, 312 P.3d 479, 482 (2013)*. Although this court normally defers to an agency's conclusions of law that are closely related to the facts, we review purely legal issues de novo, including matters **[*7]** of statutory interpretation. *See Sierra Pac. Power Co. v. State Dep't of Tax'n, 130 Nev. 940, 944, 338 P.3d 1244, 1247 (2014)*.

Legislative bodies are the parents of unemployment benefits. *See Anderson v. State, Emp't Sec. Div., 130 Nev. 294, 304, 324 P.3d 362, 368 (2014)*. When we are called upon to interpret a statute, the starting point is the statute's plain language. *See Branch Banking v. Windhaven & Tollway, LLC, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015)*. If the language of the statute is clear, we do not go beyond it. *Id.* The Division is a Nevada state agency that interpreted a federal statute when it, the referee, and the Board determined that Popal did not qualify to receive PUA. While we defer to the referee for findings of fact, we review de novo whether she properly applied the law to the facts.

The gig-economy[5] is a rapidly increasing and important portion of our economy, but it has presented considerable challenges for lawmakers who are trying to meet the policy goals of unemployment benefits under the restrictions of traditional employment law. *See* Benjamin Della Rocca, *Unemployment Insurance for the Gig Economy*, 131 YALE L.J. FORUM 799 (2022). In this case, Popal met his burden to prove his eligibility for PUA benefits under the plain language of the CARES Act. First, as a gig worker, he was ineligible for standard unemployment benefits. Next, he self-certified to the Division that he was otherwise able to work and available for work. Finally, he self-certified **[*8]** that he was out of work because his place of employment, the Express Driver Program, was closed as a direct result of the COVID-19 public health emergency. Therefore, Papal satisfied the elements for PUA eligibility under the plain language of the CARES Act.

The referee apparently relied on the length of Popal's absence from work and his use of the phrase "stopped working" to infer that he quit his job. While the length of Papal's absence was significant, the length does not prove he quit. In other employment situations, extended absences from work are allowed during periods such as short-term disability, pregnancy, or family leave without effecting a worker's status. For example, the Family and Medical Leave Act (FMLA) protects an employee who takes an extended leave of absence for pregnancy, caring for a servicemember, adoption, and other things. *See 29 U.S.C. § 2612(a)(1)*. In fact, in some instances, leaves of absences of up to 26 work weeks are allowed under the FMLA. *See id.* at *§ 2612(a)(3)*. The referee failed to find if such a situation might apply to Popal, thus the mere length of Popal's absence cannot be substituted for a finding that his self-certification was **[*9]** not credible.

As to the phrase "stopped working," "stopped" is not necessarily synonymous with "quit." Logically, workers can reasonably say that they "stopped working" for the day or longer, or that they will "stop working" on a project, without creating the sole inference that their intent is to quit their jobs. The referee did not ask Popal to clarify what he meant when he said he "stopped working" when he also testified that he intended to resume driving with Lyft after his break. Thus, Popal's use of the phrase "stopped working" cannot be substituted for a finding by the referee that his self-certification was not credible.

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[5] The "gig economy" refers to self-employed, non-farm workers who provide "clients with on-demand services." Benjamin Della Rocca, *Unemployment Insurance for the Gig Economy*, 131 YALE L.J. FORUM 799, 802 (2022). As of 2017, as many as 55 million Americans, or 34% of our labor force, worked in the "gig" economy. *Id.* at 799-800. Recent projections for 2020 data reach as high as 43% of the work force, with nearly three-quarters of those workers on app-based gig platforms, like Lyft, who are relying on gigs as their primary source of income. *Id.* at 802-03.

The referee inferred that Popal quit his job in September 2019 under the subheading of "Fact Finding" in her denial of Popal's appeal. However, the referee's conclusion is not supported by substantial evidence.[6] As already discussed, the phrase "stopped working" was too imprecise to unequivocally infer that Popal meant to quit as opposed to taking a leave of absence with the intent to return.[7] Also, no evidence was presented to rebut Popal's sworn testimony. Additionally, the referee made no finding of fact as to the reasonableness of the length of his break, since **[*10]** Popal's personal and health circumstances remained unknown. Further, the referee did not provide if she considered how the nuance of gig work or the Express Driver Program's no-notice requirement affected her interpretation of Popal's self-certification. And finally, there was no finding by the referee that Popal's sworn testimony lacked credibility.[8]

Thus, the referee implicitly created an additional element to PUA self-certification that is not found under the statute: the applicant bears a burden of proof beyond self-certification without a finding that his or her testimony lacks credibility. In this case, this was an apparent narrowing of the CARES Act by the Division, the referee, and the Board, which created an additional barrier to individual economic relief in contravention of the CARES Act and President Biden's executive order directing agencies like the Division that distribute federal funds to provide the "greatest relief" to individuals like Popal.[9]

We turn now to the referee's reliance on the DOL's guidance through Question 14 and her application of it to Popal. There is a notable difference between the statutory language of the CARES **[*11]** Act, which allows for PUA benefits when an applicant self-certifies that his "*individual*[] place of employment is closed" as a result of the pandemic, when compared to the DOL's Question 14, which directs agencies to deny PUA benefits when an applicant cannot find work because "*some businesses* have closed and/or may not be hiring due to COVID-19." (Emphasis added.) The DOL guidance speaks to the effect of general business closures on a PUA application, whereas Congress directs a state to grant PUA benefits to an applicant who self-certifies that his or her individual place of business closed as a result of the pandemic.

Popal self-certified that the basis for his PUA eligibility was that his individual place of business, the Express Driver Program, was closed as a result of the pandemic, satisfying his burden under the CARES Act. However, the appeals referee affirmed the termination of Popal's PUA benefits without considering where the location of Popal's individual place of business was, nor finding that his self-certification of it being the Express Driver program was not credible. By so doing, the referee effectively treated the closure of the Express Driver Program as a general **[*12]** sector business closure instead of Popal's individual place of employment.

It is undisputed that Papal was self-employed as a Lyft driver, but he did not own his own car. It is also undisputed that Papal rented a car weekly through the Express Driver Program for more than two-and-a-half years. If the Express Driver Program was Popal's individual place of employment as he certified, and there was no finding by the referee otherwise, then apparently the Division improperly further narrowed the CARES Act by restricting Popal, an app-based gig worker, from having a claim for an individual place of employment being shut down under *15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj)*. This conclusion is problematic since Popal testified that the Express Driver Program was shut down in March 2020 because of the pandemic, and that as a result, he could not return to work.

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[6] We may overturn a finding of fact if it lacks the support of substantial evidence. *See Elizondo, 129 Nev. at 784, 312 P.3d at 482*.

[7] Lyft drivers who have been accepted into the Express Driver Program may take breaks from serving customers without needing to reapply. Lyft Express Drive, *Terms: 19. Relationship with Lyft*, https://www.lyft.com/terms (last visited Oct. 17, 2022) (last updated April 2021).

[8] *See Simmons v. Ariz. Dep't of Econ. Sec., No. 1 CA-UB 21-01.71, 2022 Ariz. App. LEXIS 282, 2022 WL 4350555, at *1 (Ariz. Ct. App. Sept. 20, 2022)* (reversing the administrative denial of PUA benefits and noting that the applicant's sworn testimony was sufficient evidence to establish his eligibility absent a finding by the administrative tribunal that his testimony lacked credibility); *In re Chandler, No. A21-1594, 2022 Minn. App. Unpub. LEXIS 540, 2022 WL 3348646, at *2 (Minn. Ct. App. Aug. 15, 2022)* (deferring to an administrative law judge's finding of fact that a PUA applicant's testimony was not credible).

[9] Additionally, the Supreme Court of Nevada has stated that the purpose of unemployment statutes in Nevada is "to advance the protective purposes of Nevada's unemployment compensation system of providing temporary assistance and economic security" and "to soften the economic burdens of those who find themselves unemployed through no fault of their own." *Anderson, 130 Nev. at 300, 304, 324 P.3d at 365, 368* (internal quotations omitted).

Furthermore, the referee cited the DOL's Question 14 and its direction to state agencies to deny PUA benefits to applicants who become "unemployed" for reasons other than the pandemic in her decision to deny Papal PUA benefits. Yet we note that the DOL has itself classified people as "unemployed" only if "they do not have a job, have actively looked for work in the prior 4 weeks, **[*13]** and are currently available for work." Bureau of Labor Statistics, *Who is Counted as Unemployed?*, https://www.bls.gov/cps/faq.htm (last visited Oct. 5, 2022). Thus, by the DOL's own definition, it takes more than a mere absence from work before it will consider a person to be unemployed.

The DOL's definition of unemployed is instructive because the Division is a state agency interpreting federal law. In this case, Popal was not looking for work prior to March 2020 because, according to his sworn testimony, he believed he would return to his regular job in the Express Driver Program. He also testified that the job was his to return to. Accordingly, Popal's situation may not have met the DOL's definition of unemployment as used in Question 14.

Because of the foregoing, Popal's application cannot properly fall within the DOL's guidance under Question 14 absent a finding by the referee that his sworn testimony was not credible. The language of the CARES Act is plain; Popal satisfied his burden under the law when he self-certified to each requirement to receive PUA benefits and he was not otherwise disqualified.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND with **[*14]** instructions to direct the Board to reinstate Popal's PUA ben.efits.[10]

/s/ Gibbons, C.J.

Gibbons

/s/ Tao, J.

Tao

/s/ Bulla, J.

Bulla

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[10] Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

EXHIBIT L

15 USCS § 9001

Current through Public Law 118-224, approved January 2, 2025, with a gap of Public Law 118-159.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 123) > CHAPTER 116. CORONAVIRUS ECONOMIC STABILIZATION (CARES ACT) (§§ 9001 — 9141) > KEEPING AMERICAN WORKERS PAID AND EMPLOYED (§§ 9001 — 9013)

§ 9001. Definitions

In this title [*15 USCS §§ 9001* et seq.]—

(1) the terms "Administration" and "Administrator" mean the Small Business Administration and the Administrator thereof, respectively; and

(2) the term "small business concern" has the meaning given the term in section 3 of the Small Business Act (*15 U.S.C. 636*).

History

March 27, 2020, *P.L. 116-136*, Div A, Title I, § 1101, *134 Stat. 286*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Short titles:

Other provisions:

Short titles:

Act March 27, 2020, *P.L. 116-136*, § 1, *134 Stat. 281*, provides: "This Act may be cited as the 'Coronavirus Aid, Relief, and Economic Security Act' or the 'CARES Act'.". For full classification of such Act, consult USCS Tables volumes.

Act March 27, 2020, *P.L. 116-136*, Div A, Title II, Subtitle A, § 2101, *134 Stat. 313*, provides: "This subtitle may be cited as the 'Relief for Workers Affected by Coronavirus Act'.". For full classification of such subtitle, consult USCS Tables volumes.

Act March 27, 2020, *P.L. 116-136*, Div A, Title IV, Subtitle A, § 4001, *134 Stat. 469*, provides: "This subtitle may be cited as the 'Coronavirus Economic Stabilization Act of 2020'.". For full classification of such subtitle, consult USCS Tables volumes.

Act April 24, 2020, *P.L. 116-139*, § 1, *134 Stat. 620*, provides: "This Act [amending *15 USCS §§ 636*, *9006*, *9009*] may be cited as the 'Paycheck Protection Program and Health Care Enhancement Act'.".

Act Dec. 27, 2020, *P.L. 116-260*, Div N, Title II, Subtitle A, Ch 1, § 200, 134 Stat. 1950, provides: "This chapter may be cited as the 'Continued Assistance for Unemployed Workers Act of 2020'.". For full classification of such chapter, consult USCS Tables volumes.

Act Dec. 27, 2020, *P.L. 116-260*, Div N, Title III, § 301, *134 Stat. 1993*, provides: "This title may be cited as the 'Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act'.". For full classification of such title, consult USCS Tables volumes.

Act Dec. 27, 2020, *P.L. 116-260*, Div N, Title IV, Subtitle B, § 420, *134 Stat. 2061*, provides: "This subtitle [adding *15 USCS § 9111*] may be cited as the 'Coronavirus Economic Relief for Transportation Services Act'.".

Act March 11, 2021, *P.L. 117-2*, § 1, *135 Stat. 4*, provides: "This Act may be cited as the 'American Rescue Plan Act of 2021'.". For full classification of such Act, consult USCS Tables volumes.

Act Aug. 5, 2022, *P.L. 117-165*, § 1, *136 Stat. 1363*, provides: "This Act [amending *15 USCS §§ 636*, *9009*, *9009b*] may be cited as the 'COVID-19 EIDL Fraud Statute of Limitations Act of 2022'.".

Other provisions:

Definitions.

Act Dec. 27, 2020, *P.L. 116-260*, Div N, Title III, § 302, *134 Stat. 1993*, provides: "In this Act [for full classification, consult USCS Tables volumes]:

"(1) Administration; administrator. The terms 'Administration' and 'Administrator' mean the Small Business Administration and the Administrator thereof, respectively.

"(2) Small business concern. The term 'small business concern' has the meaning given the term in section 3 of the Small Business Act (*15U.S.C. 632*).".

Economic relief related to the COVID-19 pandemic.

Ex. Or. No. 14002 of Jan. 22, 2021, 86 Fed. Reg. 7229, provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

"Section 1. Background. The pandemic caused by the coronavirus disease 2019 (COVID-19) has led to an economic crisis marked by the closure of small businesses, job loss, food and housing insecurity, and increased challenges for working families balancing jobs and caregiving responsibilities. The current economic crisis has affected Americans throughout the Nation, but it is particularly dire in communities of color. The problems are exacerbated because State and local governments are being forced to consider steep cuts to critical programs to address revenue shortfalls the pandemic has caused. In addition, many individuals, families, and small businesses have had difficulties navigating relief programs with varying eligibility requirements, and some are not receiving the intended assistance. The economic crisis resulting from the pandemic must be met by the full resources of the Federal Government.

"Sec. 2. Providing Relief to Individuals, Families, and Small Businesses; and to State, Local, Tribal, and Territorial Governments. (a) All executive departments and agencies (agencies) shall promptly identify actions they can take within existing authorities to address the current economic crisis resulting from the pandemic. Agencies should specifically consider actions that facilitate better use of data and other means to improve access to, reduce unnecessary barriers to, and improve coordination among programs funded in whole or in part by the Federal Government.

"(b) Agencies should take the actions identified in subsection (a) of this section, as appropriate and consistent with applicable law, and in doing so should prioritize actions that provide the greatest relief to individuals, families, and small businesses; and to State, local, Tribal, and territorial governments.

"(c) Independent agencies, as enumerated in *44 U.S.C. 3502(5)*, are strongly encouraged to comply with this section.

"Sec. 3. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

"(i) the authority granted by law to an executive department or agency, or the head thereof; or

"(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

"(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

"(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.".

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EXHIBIT M

15 USCS § 9058

Current through Public Law 118-233, approved January 4, 2025, with a gap of Public Law 118-159.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 123) > CHAPTER 116. CORONAVIRUS ECONOMIC STABILIZATION (CARES ACT) (§§ 9001 — 9141) > ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY (§§ 9041 — 9141) > CORONAVIRUS ECONOMIC STABILIZATION (§§ 9041 — 9063)

§ 9058. Temporary moratorium on *eviction* filings

(a) Definitions. In this section:

(1) Covered dwelling. The term "covered dwelling" means a dwelling that—

(A) is occupied by a tenant—

(i) pursuant to a residential lease; or

(ii) without a lease or with a lease terminable under State law; and

(B) is on or in a covered property.

(2) Covered property. The term "covered property" means any property that—

(A) participates in—

(i) a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (*34 U.S.C. 12491(a)*)); or

(ii) the rural housing voucher program under section 542 of the Housing Act of 1949 (*42 U.S.C. 1490r*); or

(B) has a—

(i) Federally backed mortgage loan; or

(ii) Federally backed multifamily mortgage loan.

(3) Dwelling. The term "dwelling"—

(A) has the meaning given the term in section 802 of the Fair Housing Act (*42 U.S.C. 3602*); and

(B) includes houses and dwellings described in section 803(b) of such Act (*42 U.S.C. 3603(b)*).

(4) Federally backed mortgage loan. The term "Federally backed mortgage loan" includes any loan (other than temporary financing such as a construction loan) that—

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1 to 4 families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

§ 9058. Temporary moratorium on eviction filings

(5) Federally backed multifamily mortgage loan. The term "Federally backed multifamily mortgage loan" includes any loan (other than temporary financing such as a construction loan) that—

(A) is secured by a first or subordinate lien on residential multifamily real property designed principally for the occupancy of 5 or more families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

(b) Moratorium. During the 120-day period beginning on the date of enactment of this Act [enacted March 27, 2020], the lessor of a covered dwelling may not—

(1) make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges; or

(2) charge fees, penalties, or other charges to the tenant related to such nonpayment of rent.

(c) Notice. The lessor of a covered dwelling unit—

(1) may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate; and

(2) may not issue a notice to vacate under paragraph (1) until after the expiration of the period described in subsection (b).

History

March 27, 2020, *P.L. 116-136*, Div A, Title IV, Subtitle A, § 4024, *134 Stat. 492*.

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